MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING's BENCH, CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE SIXTH.

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EXCHEQUER.

VOLUME THE SIXTH;

CONTAINING,

CASES argued and adjudged in the Court of QUEEN's BENCH at Weſtminſter, in the Second and Third Years of QUEEN ANNE, in the Time when SIR JOHN HOLT, KNT. ſat as Chief Juſtice in that Court: together with the Pleadings to ſeveral of the Caſes.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Eſq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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1794.

THE
PREFACE
TO THE
READERS.

IT is not to be doubted, but that, upon a serious perusal, these Reports, now presented to you, will appear to be taken with great care and solidity; several eminent persons of distinguishing judgments in matters of this nature having recommended and encouraged this undertaking.

THE Author seems to be a studious and observing GENTLEMAN, who was attendant at THE BAR many years, and had time and ability sufficient for such a performance.

I WILL only first observe, that these ensuing Cases were lately argued and adjudged in THE QUEEN'S BENCH, and never printed before, so as there are no contemporary Reports yet extant.

And it is a good observation of my LORD COKE, " That latter resolutions and judgments are the surest, " and therefore the best to season students in settling their " judgment."

"judgment." And for that purpoſe, I obſerve here are ſome Reſolutions, which either explode or correct former Reſolutions, as being opinions wavering and not well digeſted, or not fully agreeable to the rule and reaſon of the Law.

In ſhort, theſe were taken when my Lord Chief Justice Holt, the great maſter of experience of the practice of that court, ſat there.

But becauſe it is known, that Prefacers' extravagant recommendations of books are very ſuſpicious, and that thereupon the readers not finding them anſwerable to the *præ-encomiums*, their over-raiſed expectations become palled, and they throw them aſide with ſlight and indignation, therefore theſe Caſes, as argued and reſolved, are wholly ſubmitted to your reſpective judgments.

Valete.

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MICHAELMAS TERM,

The Second of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Henry Gould, *Knt.*
Sir Lyttleton Powis, *Knt.* } *Justices.*
Sir John Powell, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*
Simon Harcourt, *Esq. Solicitor General.*

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* Staple *against* Heydon.

*[1]

Michaelmas Term, 13. *Will.* 3. *Roll* 370.

Case 1

In trespass for throwing down rails, and entering a wharf, if the defendant plead that *A.* was possessed of the wharf under a lease then unexpired, and had *a way* from thence over the *locus in quo*, and underlet the same to the defendant, with all *ways, &c.* necessary to the enjoying of the same, and that he the defendant had no other way to the *terminus ad quem*, the allegation that the defendant had "no other way" is surplusage; and an issue taken thereon is an *immaterial issue.* S. C. 1. Salk. 173. 216. S. C. 2. Salk. 579. S. C. 3. Salk. 121 S. C. Holt, 217. S. C. 1. Ld. Ray. 707. S. C. 2. Ld. Ray. 922. Hob. 66. 2. Mod. 143. Carth. 75. 176. 281. Skin. 228. 664. Salk. 407. &c. 517. Sir M. Hale's notes on F. N. B. 86. K.

THE PLAINTIFF *Staple* brings trespass against *John Heydon* and *George Fowler*, for that they, on the thirty-first day of *May*, in the thirteenth year of the late *king William*, broke his close, called THE WHARF, in *Stepney* in *Middlesex*, and threw down a perch of rails therein standing: and also, for that, on the seventh day of *July* following, they entered into the same WHARF, and committed the like trespass.

The defendant *George Fowler*, as to all, pleads *not guilty*.

But *John Heydon*, as to the trespass laid on the thirty-first of *May*, pleads *not guilty* as to the force, and *justifies* the entry, and throwing down the rails, for that long before one *Edward Gray* was possessed by virtue of a certain lease for eighty years, then to

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come, and yet unexpired, of the ſaid WHARF, and alſo of a yard next adjoining thereunto; and that, for the neceſſary uſe of the ſaid yard, he had and uſed *a way* over the ſaid WHARF to certain ſtairs on the *river Thames*, which was thereunto contiguous, there to take water, &c.; and that being ſo poſſeſſed, he, on ſuch a day and year, which was prior to the time laid in the treſpaſs, demiſed the ſaid yard, *inter alia*, to the defendant *John Heydon* for a term of years yet unexpired, with all lawful ways, &c. thereunto belonging; by virtue whereof he entered, and was poſſeſſed, &c. whereby he was intitled to the ſaid *way*: that the plaintiff obſtructed it with rails; ſo that he, coming to uſe it, could not paſs; and that he requeſted the plaintiff to open the rails, which he refuſed; ſo he juſtified the throwing them down. He pleaded directly in the ſame manner to the other treſpaſs laid on the ſeventh of *July*; and avers, that, at the ſeveral times, he had no other *way* to the ſaid ſtairs and *river Thames* than by and through the ſaid WHARF.

* [2]

Hob. 66.

* The plaintiff, as to the plea to the firſt treſpaſs, replies, that the defendant *John Heydon* had another convenienter way to the *river Thames* than through the ſaid WHARF, and thereupon they were at iſſue: and upon the plea to the treſpaſs on the ſeventh of *July* he demurs; "therefore let a jury come to try the iſſues, and aſſeſs "contingent damages upon the demurrer."

Both defendants made default at *niſi prius*; which being recorded, the inqueſt is awarded by default, and *G. Fowler* is found guilty of the treſpaſs on the thirty-firſt of *May*, but acquitted of that on the ſeventh of *July*; and *John Heydon* is acquitted of the treſpaſs on the thirty-firſt of *May*, as to the force, but the jury found, as to the reſt, that he had no other way to the ſaid ſtairs and *river Thames* than through the ſaid WHARF; and aſſeſs damages upon the demurrer, and acquit him of the treſpaſs on the ſeventh of *July*.

In this caſe ſeveral points were moved, and reſolved by the Court.

THE FIRST QUESTION was, Whether *a repleader* ſhould be in this caſe, there being, as was ſaid, an *immaterial iſſue* joined? And THE COURT held clearly the iſſue was impertinent.

But as to repleaders in general, THE COURT held,

When a repleader ſhall be upon an immaterial iſſue.

FIRST, That *a repleader* is to be awarded when ſuch an iſſue is joined, as the Court after trial thereof cannot give a judgment, as being impertinent or uncertain, and not determining the right (*a*).

Poſt. 102. Carth 371. Vide Doctrina Pl. 311.

Before the ſtatutes of jeofails the Court might award *a repleader* on an immaterial iſſue.

SECONDLY, That before the *ſtatute of jeofails* (*b*), if ſuch an iſſue were joined, the Court before trial might award a repleader (*c*).

(*a*) See the Year-Book 22. *Hen.* 6. pl. 16. 1. Keb. 23. 39. 89. 1. Lev. 32. And ſee the caſe of Rex *v.* Philips, 1. Burn, 295.

(*b*) 16. & 17. *Car.* 2. c. 8.

(*c*) 3. Keb. 664. 1. Salk. 216. 2. Salk. 579.

THIRDLY,

THIRDLY, When *a repleader* is awarded, the amendment must begin where the plea, which makes the issue bad, begins to be faulty (*a*); and therefore if one make himself a bad title to his declaration, to which there is a bad bar, and thereupon a bad replication, on which there is issue, there the repleader must be awarded and entered on record; and the plaintiff shall declare *de novo*, &c. But if the bar be good, or the plea be good, and the replication bad, and issue thereupon, there a repleader will be only as to replication; but if bar and replication be both bad, and a repleader is awarded, it must be as to both (*b*).

On a *repleader* awarded, the *amendment* begins where proceedings were first faulty. Raym. 458. Cowp. 510. 5. Com. Dig. "Pleader" (R. 18.).

FOURTHLY, If the Court award *a repleader* where it ought not to have been, or deny it when it ought to be, it is error (*c*).

It is error to award a *repleader* improperly.

FIFTHLY, That upon the award of *a repleader*, there must be no costs (*d*), because it is a judgment of the Court upon the pleading; but upon *amendment* of a plea in paper, there must be costs (*e*).

No costs on award of repleader. Hard. 331.

2. Vent. 196. Barnes, 125. Salk. 579. 1. Burr. 301. 3. Burr. 304. Hullock on Costs, 353.

SIXTHLY, That upon a general rule for *repleader*, without any direction from the Court from what they should begin the *repleader*, it must begin from the first fault which occasioned the bad pleading commenced; for the judgment is, *quod partes replacitent* (*f*).

General rule of repleader.

* [3]

* SEVENTHLY, That the pleadings in this case were such as *a repleader* would be awarded upon at the common law; for the defendant having insisted upon a title to *a way* by grant, his averment, that he had no other way, was immaterial, and by consequence the issue thereupon impertinent; besides, there was no issue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative.

Averment immaterial, and the issue impertinent. Carth. 371.

EIGHTHLY, That though *a repleader* should have been at common law in this case, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the *statute of jeofails*, THE COURT said it would be just in them not to grant *a repleader* till after verdict; for they said, they might indeed grant *a repleader* before verdict at common law, but they were not bound to do it.

Repleader by common law, and when grantable.

SO NOTE the diversity since the statute; for though it were reasonable to award *a repleader* before verdict at common law, where the pleading appeared such on which no judgment could be after verdict; yet since the statute, when a verdict may cure immaterial or informal issues, it may not be proper to do it.

Aid by statute law.

(*a*) Year-Books 5. *Edw.* 4. pl. 8. 19. *Edw.* 4. pl. 1. And see Dyer, 117, 118.
(*b*) 3. Keb. 664.
(*c*) Post. 102.
(*d*) Hardres, 331. 1. Lev. 32. 1. Burr. 301. 304.
(*e*) 2. Vent 196. Loft's Rep. 155. Hullock on Costs, 347.
(*f*) 2. Salk. 579. 4. Bac. Ab. 126.

NINTHLY,

No issue joined. 2. Lev. 135. Aug. 12. 1. Saund. 318, 319. — 3. Com. Dig. "Chemin" (D. 2.)

NINTHLY, After the trial THE COURT held, that this issue was such on which no judgment could be; for the defendant pleaded, that he had no other way to *the stairs* and *river Thames*; the plaintiff replies, that he had another way to *the Thames*; and the jury found no other way to the said *stairs* and *river Thames*; so in truth there was no issue joined.

No repleader when parties are out of court.

TENTHLY, that in this case there could be no *repleader*, for the parties were quite out of court by the default.

Repleader after verdict. Cro. Eliz. 318. 883.

NOTE, By the Year-Book 40. *Ed.* 3. 15. if a jury do not find *assets* to a certain value, the verdict is insufficient, and *a repleader* shall be granted, and the issue tried by another inquest.

THE SECOND QUESTION was in reference to *the way* claimed; and these points were agreed on by all, *viz.*

A way cannot be claimed from one part of a man's ground to another. Post. 149. 163. Carth. 451. 3. Com. Dig. "Chemin" (D. 1.).

FIRST, that a man cannot claim *a way* over my ground from one part thereof to another; but from one part of his own ground to another, he may claim a way over my ground.

A stranger may have a way over another's soil. Post. 149. 2. Roll. Abr. 60. 2. Cro. Jac. 170. Yelv. 164. 1. Brownl. 6. 226. 3. Com. Dig. "Chemin" (D. 2.) (D. 4.).

SECONDLY, A stranger may have *a way* over another's soil three manner of ways, *viz.* for necessity, by grant, and by prescription. For necessity; as if *A.* has an acre of ground surrounded by ground of *B. A.* for necessity has a way over a convenient part of *B.'s* ground to his own soil, as a necessary incident to his ground: So if *A.* grant a piece of land which is surrounded by land of the vendor, he grants a way as a necessary incident therewith.

The grantee of land shall have all the ways, easements, &c. which the grantor had. Cro. Jac. 121, 122. 170. 3. Lev. 305. * [4] 3. Com. Dig. "Chemin" (D. 3.) (D. 4.).

THIRDLY, If one be seised of *Black-acre* and *White-acre*, and use a way over *White-acre* from *Black-acre* to a mill, river, &c. and he grant *Black-acre* to *B.* with all ways, easements, &c. the grantee shall have the same conveniency that the grantor had when he had *Black-acre.* So if *A.* has two acres of land, and has a way from them over another's soil, and grant one of them with all ways, the grantee shall have the same way that the grantor had: but there the * grantee, in making title, must alledge such an estate in the grantor as is traversable, and not only say, that the grantor was *possessed* of the place to which, &c. for a term of years; for there the possession would be traversable materially.

Plea in a way by necessity. Noy. 9. Faresl. 55.

If a way of necessity be claimed, it is a good plea to say, the party has another way; but otherwise where a way is claimed by grant or prescription.

The way of pleading a particular estate.

FOURTHLY, The way of pleading in this case had been to shew, that such a one was seised in fee of the place to which, &c. and being so seised was intitled to a way, and shew how, and that he granted to the lessor, &c. who also granted it to him, &c. for when one shews a *particular estate*, he must settle *the fee* in somebody.

FIFTHLY,

FIFTHLY, It was agreed, that by the grant of a houſe to which there is a way of neceſſity, without more, the grantee ſhall have the way as well as if it were ſpecially mentioned in the grant.

The grant of a houſe is alſo a grant of a way to it.

Hob. 254. 295. Cro. Jac. 170. 190. 3. Com. Dig. "Chemin (D. 3.)."

ON THE THIRD QUESTION it was reſolved, that if the plaintiff had demurred to the defendant's plea, without doubt he ſhould have had judgment (*a*); for that after a demurrer *a repleader* ſhall not be, becauſe the parties by mutual aſſent have put themſelves on the judgment of the Court (*b*).

A repleader is not grantable after demurrer.

UPON THE FOURTH QUESTION, Whether the matter were now cured after verdict by the *ſtatute of jeofails?* theſe points were agreed:

In what caſe the verdict ſhall cure an immaterial iſſue.

FIRST, If a jury find a point in iſſue, and a ſuperfluous matter over and above, that ſhall not vitiate the verdict.

SECONDLY, That in this caſe the jury found nothing that was put in iſſue; for they do not find that either he had no other way, or had another way to *the Thames*; but that he had no other way to the ſtairs and *Thames*, which might well be, and yet he might have another way to *the Thames*.

ON THE FIFTH QUESTION, as to defaults after iſſue, THE COURT took a diverſity between a real and a perſonal action; for in a real action, if a tenant make default, the demandant may, if he pleaſe, waive the benefit of it, and proceed by further proceſs againſt him; as if the tenant make default on the original, the demandant ſhall have *a grand cape (c)*; and if the tenant do not ſave his default, the demandant, if he inſiſts upon it, ſhall have judgment final upon the firſt default (*i. e.* at the return of *the grand cape*), but he may, if he pleaſe, releaſe the default, and continue further proceſs againſt him: in like manner of a default after appearance, the demandant ſhall have *a petit cape*, &c. and if the tenant do not ſave his default, he may have judgment upon the default; or if he will waive that advantage, he may, and proceed by further proceſs. If, in a real action, the tenant make default at *niſi prius*, the default is never recorded, but only *the poſtea* marked; and the demandant, if he will, ſhall have *a petit cape*, and judgment thereupon, if the default * be not ſaved; or elſe he may waive the *default*, and continue with further proceſs. But in caſe of a perſonal action, a default at the trial is always recorded, and there is no further proceſs in law to bring the defendant into court upon releaſe of the default. And anciently, at every *continuance-day*, the parties were demandable; and if the defendant did not appear, or were not *eſſoined*, his default was

On a default at niſi prius after iſſue, in a real action, final judgment ſhall be given, except the default be ſaved by the tenant or waived by the demandant.

1. Roll. Abr. 585. 1. Lev. 105. 1. Mod. 248. 2. Show. 424. 1. Salk. 216, 217. 1. Bulſt. 160. 2. Cro. 36. 1. Vent. 60. 2. Saund. 45. 1. Jo. 412, 413. 1. Cro. 517. Stra. 46. 612. 3. Com. Dig. "Enqueſt" (L.). 5. Com. Dig. "Pleader" (B. 11.).

* [5]

(*a*) See Ridgeway's caſe.

(*b*) Li. 3. 52. Doctr. Plac. 311. Sed vide poſt. 102. and 3. Lev. 440. contra.

(*c*) See 1. Lev. 105, that judgment ought not to be given on a default in real actions, but that *a grand cape* ought to iſſue on a default before appearance, and *a petit cape*, if the default be after appearance. See 2. Inſt. 80.

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2. Cro. 511. But see 2 Term Rep. 16. that an *essoin* does not lie in a personal action.

recorded, and judgment given against him thereupon: But by the *statute of Marlbridge* (*a*), and the statute of *Westminster the Second* (*b*), after issue joined in a personal action, the defendant shall have but one *essoin* and one *default*; and if the *default* be upon the *venire facias*, then it is recorded, and *a distringas* shall go against the jurors *ad triand'*, and against the defendant, to receive his judgment; but if he come in at the day of *nisi prius*, he saves his default; but if he does not, the default is peremptory, and *final judgment* shall be given thereupon. And it is to be observed, that this one *essoin* and one *default* that the statutes give, must be at the first *continuance* after the issue; for if the defendant should appear at the first continuance, VIZ. at the *venire facias*, he shall neither be *essoined*, or have *a default* saved at the return of the *distringas*; but judgment peremptory shall be given on such default (*c*). But if the defendant *imparl* to a day in a personal action, and do not appear at the day, *judgment final* shall be given against him; for the *default* is *peremptory* to him, and there is no process to bring him into court again. In debt, the defendant pleads in abatement to the writ (*d*), to which the plaintiff *imparls*, and, at the day given, the defendant makes default; *judgment final* is upon the default, though the plea was only in abatement. In trespass, the defendant demurred (*e*), and made default at the day given, and *judgment final*. In debt upon an obligation (*f*), the defendant pleads a release, and, after demurrer, day is given, and default is made by the defendant at the day; *judgment final* shall be given. In trespass, if the defendant imparls (*g*), and makes default at the day, judgment final shall be given. So in debt (*h*). And the case of *Feplow v. Rowley* (*i*) was remembered, where a judgment in an inferior court was reversed for this error, That the defendant being *essoined*, and making default at the day given by *essoin*, they gave a further day when it should be a judgment by default.

Whether here judgment should be upon the demurrer, or upon the default.

So now, what stuck with THE COURT was, Whether judgment should be given upon *the demurrer* against the defendant, or upon *the default?* That is, Whether, he being out of court as to one issue by the default, he could be present in court as to the issue in law upon *the demurrer*, so that the Court might give judgment thereupon?

And as TO THIS POINT, the case was, A defendant in two several trespasses pleads an ill plea to one; on which the plaintiff demurs, and joins issue upon the other, and makes default at the day of *nisi prius*; whereupon the inquest is taken by default as to the issue, and contingent damages upon the demurrer.

(*a*) C. 13.
(*b*) C. 27.
(*c*) 2. Inst. 217.
(*d*) Year-Book 38. *Hen.* 6. pl. 33.
(*e*) Year-Book 18. *Edw.* 4. pl. 7.
(*f*) Year-Book 1. *Hen.* 7. pl. 21.
(*g*)
(*h*) Year-Book 11. *Hen.* 7. pl. 5.
(*i*) Cro. Jac. 358.

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Ward, *for the plaintiff*, argued, that judgment ought to be upon the demurrer.

* First, This is not such *a default* on which judgment can be given; and he took this diversity, That wherever, in a real action, the default is saveable, so that *grand* or *petit cape* shall go, there, in a personal action, *a default* is not peremptory; but there is, indeed, a proper process to issue, and bring the party into court. As for the purpose, in a real action after imparlance *prece partium*, or upon *essoin*, if the party having chose his day fail thereupon, *peremptory judgment* shall be thereupon, and the lands seized; and in that case, judgment would be likewise peremptory in a personal action; but if *the default* were upon the return of a process, which is saveable in a real action, there judgment peremptory ought not to be in a personal action, because there the day is not taken or chosen by the party, but given to him by the Court; and it seems but reasonable that he should be more severely used upon his default at his own day, than at a *dies datus* by the Court. But this is only in reference to defendants; but in case of plaintiffs, they are in many cases demandable at the day given to pursue their writ; but in case of defendants, upon default at a day given before plea pleaded, there shall be no *judgment peremptory* (a). In trespass, the defendant appeared upon *the exigent*, and day is given over to another Term, at which the defendant makes *default*; and *per Curiam*, the plaintiff can only have process *ad respondendum*, and if he fail thereat, then three *capias's* and *exigent* as before; and he quoted the cases in the margin (b). The writ of *ad audiendum judicium* was of great use then, though now altogether disused. The Year-Book of *Henry the Sixth* (c) gives an account of it, that formerly, when a demurrer was joined in a real or personal action, this writ used to go to bring the parties in to hear judgment; but now the course is, that he attend at his peril. By the Year-Book of *Henry the Sixth* (d) it appears, that the defendant is not demandable on demurrer, but the plaintiff is only to appear and pray his judgment: Just as upon a *writ of enquiry* of damages, the defendant has no *day in bank*; and in THE COMMON PLEAS, neither plaintiff nor defendant have a day given them, but the plaintiff is to attend for his judgment (e): but the plaintiff has a day by course of the king's bench (f). Now here, though there be but one *venire facias* to try the issue, and inquire of the contingent damages, yet these are as two distinct matters; for anciently the course was not to put both together; but that is new, and for ease and dispatch; and here the

* [6]

(a) Year-Book 7. *Hen.* 6. 19. 41. 19. *Hen.* 8. pl. 6.

(b) Year-Book 20. *Edw.* 3. pl. 12. the *Hen.* 4. pl. 3. the 2. *Hen.* 4. pl. 4. the 11. *Hen* 4. pl. 31, 32. the 20. *Hen.* 6. pl. 44. and Jud. Reg. 1. a and b.

(c) 37. *Hen.* 6. pl. 29.

(d) 4. *Hen.* 6. pl. 29.

(e) See Preston *v.* Tooley, Cro. Eliz. 75. S. C. Yelv. 97. S. C. 11. Co. 6. and Mathew *v.* Hassell, Cro. Eliz. 144.

(f) Yelv. 97. 1. Roll. Abr. 486.

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jury might have been discharged of the issue, and yet inquire of the damages as an inquest of office *(a)*.

How if judgment were to be upon the default.

SECONDLY, He insisted on it, that if judgment were to be upon *the default*, it must have been given at the *nisi prius*, and that being not done, and *the default* being for the plaintiff's advantage, he might waive * or release it, and quoted the Year-Book of *Edward the Third* (*b*). And the defendant upon a writ of error can never take advantage of the matter (*c*).

* [7]

DARNELL, *contra*. Wherever there is a demurrer in any personal action, and the defendant makes *default* at the day, the demurrer is waived (*d*). In personal actions, if the parties are at issue or demurrer, and after the defendant makes default, judgment shall be upon the *default*, and *the demurrer* is waived (*e*). And as to the objection, that if judgment were to be given on *the default* it should have been immediately, I answer, that all that the Judges of *nisi prius* could do was to record the default.

POWELL, *Justice*. I do not find but that the parties are demandable both in case of a day given upon demurrer and upon issue joined; but after issue inquest may be taken by default. But in debt, suppose the defendant come in upon *the exigent*, and the plaintiff, as he may, prays a day, there, it being a day had on prayer of the plaintiff before count, if the defendant make default, process shall go to bring him in; but if the plaintiff had counted, and, before issue, the defendant had made default, if the plaintiff will demand him, he may have judgment upon *the default*. And I take it to be the same upon demurrer where day is given at which the defendant makes default, for there *judgment final* shall be, and no process *ad audiendum judicium* (*f*). And the Year-Book of 20. *Hen.* 6. *pl.* 44. is mistaken by *Fitzherbert*, for the Book is full that judgment must be upon the default. After demurrer in a personal action, process should go *ad audiendum judicium* (*g*) ; but before demurrer or issue joined, if day be given after pleading, a default will be peremptory, and judgment final upon *default*: but the usage now is not to demand them. It is very hard to make a default at a day given by the Court on demurrer peremptory; but here is an issue as to part, and a demurrer as to the other part, and a *venire facias* to try the issue and inquire of damages; and day is given with a *nisi prius*, which day of *nisi prius* is in truth but to try the issue and inquire of damages, but the day on the demurrer is *ad audiendum judicium*. So that in truth the day given

Issue to part, and demurrer to part.
Co. Lit. 71, 72.
Inst. Leg. 567.
&c.
Saund. 13.

(*a*) Year-Book 16. *Edw.* 4. pl. 1. 2. Inst. 440.

(*b*) 42. *Edw.* 3. pl. 1.

(*c*) *Vide* 2. Saund. 46.

(*d*) Year-Book 38. *Hen.* 6 pl. 33. abridged by Fitz. "Default," 59.

(*e*) Year-Book 39. *Hen.* 6. pl. 16. to 18. abridged by Brooke, "Default," 58. Bro. "Default," 73. Fitz, "Jour," 33. Fitz. "Process," 147. and the Year-Book 45. *Edw.* 3. pl. 3.

(*f*) See the Year-Book 18. *Edw.* 4. pl. 7.

(*g*) Year-Book 44. *Edw.* 3. pl. 1.

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ad triandum exitum, &c. has nothing to do with the day of demurrer, and it is not necessary that the defendant should have a day on the writ of inquiry; so that the day *ad audiendum judicium* in this case is the *day of bank*, and the default at *nisi prius* is only to that to which the defendant had a day there, that is, to try the issue, and the taking the inquest by default is a waiver of taking advantage of judgment by default. Nor do I know where the plaintiff may in a personal action take advantage of a default upon the inquest; but where the defendant pleads a release or acquittance, and at issue makes default, there indeed he may pray judgment upon the default, or that inquest be taken by default; but after he takes inquest by default, he is too * late to pray judgment by default, for his taking the inquest is a waiver of the judgment by default; and judgment must be upon *the verdict*, and not upon *the default*, that being waived by prayer of inquest. Upon an issue of *non est factum*, you cannot take a judgment by default.

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* [8]

Vide stat. 8. and 9. *W*. 3. c. 10. 2. Lilly, 43. 38.

HOLT, *Chief Justice*. The question first is, Whether if default be in a personal action after declaration, and day given over, either by imparlance or any other day,—Whether, I say, this be so peremptory that judgment final ought to be upon that default? And I think, in case of imparlance, whether to a day in the same Term, or another, judgment final ought to be. The Year-Books *Edward the Fourth* (*a*) and *Henry the Sixth* (*b*) are full in the point, without taking any difference. Now then, upon demurrer, because parties are at issue in judgment of Court, suppose it had been in real action, and a *Curia advisare vult*, and the defendant makes default, the *petit cape* must go, and he does not save his default; Shall not judgment final be given upon the default? If it be so when there is a demurrer in a real action, Is it not much stronger in a demurrer in a personal action? And it is not less peremptory upon demurrer than imparlance: for if default be after demurrer on day given in the same Term, it is peremptory; that is, if the party do not come at such a day in the same Term, it is a departure in despite of the Court; and there in a real action no *petit cape* shall go, but judgment final shall be on the demurrer, and not upon the default; so that if the Year-Book of *Henry the Sixth* be law, as sure it is, judgment is as much to be given upon default in personal actions as in real, only that there must be two defaults in a real action, and but one in a personal one. If the party come in upon process in a personal action, or upon a *cepi corpus*, or *exigent*, and day is given *prece partium*, that is, by consent of parties, at which day default is made, no judgment can be given (*c*). Why? Because there is no declaration. But if it were after declaration, and at the day default had been, it were peremptory. So is the case of 7. *Hen*. 6. 19. 41. One in custody of the marshal upon *a præmunire*, is charged by *bill* in nature of

See 5. Com. Dig. "Pleader" (B. 11.).

(*a*) Year-Book 18. *Edw*. 4. pl. 7.
(*b*) Year-Book 36. *Hen*. 6. pl. 19. and 19. *Hen*. 6. pl.
(*c*) Year-Book 19. *Hen*. 8. pl. 16. See Tidd's Pract. 219.

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an *appeal of mayhem*, and day is by consent of parties; at which there was a default: there could not be *judgment final*, because, though he had been charged in custody of the marshal, yet he never had been in court; but if the default there had been upon an imparlance, it had been peremptory, and final judgment had been thereupon. Indeed, in annuity, which though personal, yet partakes of the nature of a real action (for there is final judgment given to recover an inheritance, and the process in annuity therefore imitates that of a real action), after default there shall be a *distringas ad audiendum judicium* to afford the defendant an opportunity to save his default (*a*); because though the recovery shall charge the person only, yet it may be of an inheritance. So in a *secta ad molendinum*, if the defendant make default, there shall be *a distringas* to give him liberty to save his default; for that also follows the nature of a real action, as being of freehold or inheritance (*b*).

[9] * Aye, but this is like an *enquiry of damages*. FIRST, If judgment be against a defendant, and an enquiry of damages, he has no day given him thereupon, and therefore he can make no default; for the Court have already given their judgment against him, and he thereby is quite out of court, and the enquiry is only to ascertain the damages. But where there is both issue and demurrer, and, before judgment on the demurrer, a *venire facias* goes to try the issue, and inquire of damages, whereupon defendant has day, on which he makes default, is not that a default to the day of demurrer as well as of issue? for though they be in truth different, *viz.* one the *day of nisi prius*, and the other the *day in bank*; yet, in consideration of law, they are the same. If there be two defendants who plead severally, and one of them demurs, and judgment is given against him before issue joined with the other, then he against whom the judgment passed has no day in court, yet the plaintiff may continue process against the other; but if, in that case, the issue were to be tried before judgment, then the ~~defendant~~ who demurred has a day, and that is the same that the other has by the *nisi prius*; which by law is the same with the *day in bank*. A default in a real action at the *day of nisi prius* is the same as at *a day in bank*, and as fatal; for they are not to be severed. And why not so in a personal action? And it is incident to the trial of the issue, to inquire of the damages upon the other issue in law. So if the *day of nisi prius* be the same with the *day in bank*, the two have the same day; but here, though it be one defendant, yet you would have him be out of court as to issue, by reason of default at *nisi prius*, and in court upon the demurrer in the *day in bank*; that is, in and out of court the same day. If there be default after demurrer joined, judgment shall be upon the default, or upon the demurrer; and when continuance is given, the appearance of both parties are entered at the continuance-day, and anciently they used to demand the parties; so then they lay at lurch for one another; but now there are things of course (*c*).

Judgment upon default after demurrer joined, &c.

(*a*) Co. Lit. 144. b.
(*b*) Fitz. Nat. Brev. 123. a.
(*c*) 1. Com. Dig. "Abatement" (I. 24.) (I. 35.).

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And whereas my BROTHER POWELL affirms, that there can be no day on the demurrer but the *day in bank*; I would suppose there are two defendants, one pleads to demurrer, and the other pleads to issue, and *venire facias* goes to try the issue, and inquire of contingent damages, before the day of *nisi prius* and *puis darrein continuance* a release is made by the plaintiff to the defendant that demurred; can he plead it at *nisi prius?* And if he fail in doing it, can he plead it *in bank at day* there?

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Vide Hob. 81. [Post. 102.]

And POWELL, *Justice*, *subito* allowed that he might plead it at *nisi prius*, but not *in bank*; but after seemed to doubt, whether after demurrer, a plea *puis darrein continuance* could be pleaded? If at a day given upon a writ of error the defendant makes default, the writ of error may go on, and the judgment be affirmed; because it is no new judgment that is given for the defendant, who is now out of court by his default, but only his former judgment affirmed and ratified; but in that case it * were hard to give the defendant costs upon the statute: so if a defendant make default, the plaintiff may have judgment; for a man that is out of court may have a judgment given against him, though not for him: and he wished the defendant's Counsel to take care how they made default; for after default, though the plaintiff could not prove his declaration, so as verdict could be for him, yet it were very hard to give the defendant a judgment, for he was out of court.

* [10]

At another day, ANOTHER POINT stirred in this case was, Whether judgment might not be given against the defendant upon the issue, though looked upon as immaterial, and *a jeofail*; because the defendant confessed the trespass in his plea, and made no good justification: so (as was urged) judgment ought to be given against him by confession.

If a defendant confess the trespass, but offer matter which would be good if well pleaded, he shall not be held to the confession.

And herein HOLT, *Chief Justice*, took a diversity: If one confess the cause of action, but plead matter, which, if well pleaded, would bar the plaintiff, there it were hard to hold the defendant to such confession, and give judgment against him; as here the defendant indeed confesses the trespass, but offers such matter, as, if true and well pleaded, would justify him: but where the fact is confessed, and such matter of justification offered, which, though never so true and well pleaded, would not bar the plaintiff, there judgment may be upon the confession: as in an action for words for calling the plaintiff "*a thief*;" if the defendant justify, for that the plaintiff *received a thief*, and plead it ill, there judgment may be upon the confession, for that matter could not have been so pleaded as to have justified the words.

Hob. 69.
1. Salk. 173.
Ld. Ray. 18.
10. Mod. 227. 273.
11. Mod. 147.
Comy. 548.
Stra. 873.
5. Com. Dig. "Pleader" (Y. 2.).

In the further debate of this case THE COURT held, That if there be two defendants who sever in pleas, and one is found guilty, and an issue, not helped by the *statute of jeofails*, is tried for the other, who having made default, is out of court, so as there can be no *repleader*, and of consequence the judgment must be to quash the writ or bill, it necessarily shall be abated thereby as

Two defendants sever in pleas, &c. so as there can be no repleader.

Hob. 54.

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to the other; for though one defendant may be acquitted in part, and condemned in part of a trespass, or one of two condemned, and the other acquitted, yet the writ cannot abate as to one, and subsist as to the other; and as to trespass against two, when the acquittal or discharge of one shall discharge the other, there is the case of *Marler v. Ayliffe (a)*, trespass against two for taking a gun and a dagger, one justifies the taking in his own defence, being assaulted by the plaintiff, the other pleads *not guilty*, and is found guilty, and damages against him, and the other issue is found for the defendant; there judgment shall be against him that is found guilty, for the other's plea does not destroy the plaintiff's title for good and all: but if trespass be against two for taking the plaintiff's goods, and one plead *not guilty*, and is found *guilty*, and the other justifies the taking by gift, &c. and his plea is found true, there, forasmuch as the defendant's plea entirely destroyed the plaintiff's cause of action, he shall have judgment against neither.

[11]

Vide 2. Saund. 318, 319. 2. Keb. 750. 769. 789. 825.

* But on the last day of the Hilary Term following, THE WHOLE COURT declared, that they were of opinion, that the issue was helped by the *statute of jeofails*, and for so much gave judgment for the defendant: and as to the demurrer, gave judgment for the plaintiff without any reason.

(*a*) Cro. Jac. 134.

Case 2.

The Queen *against* Foxby.

In an indictment against a *common scold*, "*calumniatrix*" for "*rixatrix*," is bad. S. C. post 178. 213. 239. S. C. 1. Salk. Cases, 217.

A WOMAN was convicted upon an indictment for being a *common scold*.

MOUNTAGUE, in the Trinity Term before, moved in arrest of judgment, that the indictment was, that she was *communis calumniatrix*, which is not the Latin word for *a scold*, but *rixatrix*; and upon this exception, judgment was arrested this Term.

S. C. Holt, 274. Post. 311. 2. Roll. Abr. 79. K. & Faresl. 52. Blackerby's

Punishment for *a scold* is *ducking*.

NOTE, The punishment of a scold is ducking; and HOLT, *Chief Justice*, when the exception was first made, said, that it was better ducking in *a Trinity* than in *a Michaelmas Term*.

Case 3.

Anonymous.

Motion to stay proceedings cannot be made till bail is put in.

NOTE, One cannot move to stay proceedings upon a bond upon payment of principal, interest, and costs, till bail be put in for till then the parties are not in court (*a*).

Post. 25. 60. 101. 7. Mod. 114. 140.

(*a*) By 4. and 5. *Ann.* c. 16. "If, at "any time pending an action on a bond "for payment of money with a penalty, "the defendant shall bring into the court "where the action shall be depending, "all the principal money and interest "due on such bond, and also all such "costs as have been expended, &c. the "said money so brought in shall be "deemed and taken to be in full satis- "faction and discharge of the said bond, "and the Court shall and may give "judgment to discharge every such de- "fendant of and from the same accor- "dingly."

Trantor

Trantor *against* Watson.

Case 4.

The court of king's bench will not grant a prohibition to the court of admiralty before appearance.

A CAPTAIN of a ship was taken in his homeward voyage from *Jamaica* by a *French privateer*, and, being under capture, compounded for the ship's ransom with the *Frenchman*. He sends the ship home, and goes himself with the captain into *France* for his security: after the ship arrived here, and the goods had paid custom, and were brought from on board, and put into *Trantor's* custody, the defendant seized them by process of THE ADMIRALTY to force an appearance *in quâdam causâ salvagii*.

BROTHERICK, before appearance, moved for *a prohibition*, and cited *Captain Sands' Case (a)*, in *King William's* time, where, after great deliberation, the Court granted a prohibition before appearance.

But HOLT, *Chief Justice*, said, That that case was nothing like this, for that was a process in nature of *an embargo* on a ship from going to *the East Indies*, grounded upon letters patent of King *Charles the Second* to THE EAST INDIA COMPANY, and the seizure there was the ultimate end of that process, and it was not to answer why they did go, but to stop them from going; but the process here is to force an appearance.

But at last THE COURT ordered him to give notice within a day or two, and things to stay till then.

*[12]

Quære, Whether the captain of a captured vessel who ransoms her at sea, and becomes *hostage*, may libel in the court of admiralty against the ship and cargo for the payment of the ransom.

DARNELL, at another day, moved to discharge the rule, and said, that this was a case of *salvage*; and as the master has power to pawn the ship upon extraordinary occasion, so he may, in this case, subject part of the ship and cargo to save the whole. So the whole question will be, Whether THE COURT OF ADMIRALTY can compel payment of this composition? for if they have conusance of that matter, the * executing the process on land will not vitiate it, if they have original jurisdiction. As if a ship be taken as prize, and condemned, and the goods sold, and after the first owner sues the vendee for the goods, he may sue him in the admiralty; so in case of piracy; for the question will be *piracy* or *prize (b)*.

S. C. 1. Salk. 35. S. C. 2. Ld. Ray. 931. Post. 25. 79. 162. 3. Lev. 351. 4. Mod. 176. 1. Term Rep. 79.

BROTHERICK insisted upon these things.

FIRST, That his coming before appearance could not be objected to, for the process was a seizure of the goods in order to a condemnation, if by such a time security be not given to answer for the goods in case they be condemned. Suppose the owner of the goods live at *Jamaica*, and their process is to forfeit the goods if appearance be not in three days, would not this Court grant a prohibition in that case?

(a) 3. Lev. 351. 4. Mod. 176. 1. Sid. 320. 2. Lev. 25. 1. Lev. 243.
(b) Cro. Eliz. 685. 2. Saund. 259. 1. Vent. 173, 174. 308.

SECONDLY,

SECONDLY, It is too weighty a point for THE ADMIRALTY to determine, Whether the master may ransom the ship from captors (*a*). And this is what will open a way to cowardice, and cheating of owners.

THIRDLY, Though the captain may on occasion hypothecate the ship, he cannot hypothecate the goods.

FOURTHLY, In cases of *hypothecation*, the party to whom it is made, and not the party who does hypothecate, sues.

HOLT, *Chief Justice*. The master has the care of the ship, and all the goods on board it; and here, he being under capture in an enemy's hands, and no hopes of a re-taking, the question is, Whether a master, under these circumstances, may not compound for a ransom (*b*), as well as he may throw goods over-board in case of a tempest? As to the mischief objected, that such compositions prevent re-taking; it is true, a ship re-taken upon fresh pursuit, though after a week's time, shall be the first owners: but, alas! a re-taking is so foreign a supposition that it deserves but little consideration. If he then has a power to ransom the goods, the question next will be, Whether he may retain them as his security? It may be not; or if he might, and parts with them once, probably he cannot retake them; as in case of freight, he may detain them till paid; but if once he suffer them out of his possession, he may not retake them: then the question will come to this, Whether in case it appears to us that this process of theirs be illegal; as suppose here, instead of attaching the goods in the ship, they had attached cows or horses, or houshold-goods, to compel an appearance in this case, and I doubt whether they can attach any other goods to enforce an appearance but the very goods they proceed against; if we be then of opinion that they cannot attach other goods, or that they cannot retake these goods, suppose in the hands of a vendee, ought we not, I say, in such case, though we rarely do it, to grant a prohibition?

1. Salk. 3. 34, 35. 424. Post 79. 162. 1. Sid. 418. 1. Vent. 32. 1. Lev. 267. Vide Hob. 12. 42. 115. 8. Co. 147.

POWELL, *Justice*. Regularly when one moves for a prohibition, he ought to have a copy of the libel: and if, in any case, THE ADMIRALTY can issue process against goods, it is hard to suppose this an illegal process; and without we do so, we cannot prohibit them. The process is to seize the ship and goods there, &c. *in quâdam causâ salvagii*; [13] * and execution is suggested to be of the goods after they were taken out of the ship, in the hands of

(*a*) But now by 22. *Geo.* 3. c. 25. "It shall not be lawful for any of his "majesty's subjects to ransom or to "enter into any contract or agreement "for ransoming any ship or vessel be- "longing to any of his majesty's sub- "jects, or any merchandize or goods on "board the same which shall be cap- "tured by the subjects of any state at war with his majesty, or by any persons committing hostilities against his majesty's subjects. And all contracts and agreements entered into, and all bills, notes, or other securities given for such purposes, are declared void, and the offender subject to a penalty of five hundred pounds."

(*b*) See 22. *Geo.* 3. c. 25. *supra*.

another

another person; and if a ship be hypothecated, in whose hands soever it comes, it is liable; therefore if goods may be hypothecated, it will be the same; and if you have good cause of prohibition, giving security will not hurt you; and if the execution be what process does not warrant, you have your remedy against the officer. TRANTOR *against* WATSON.

DR. LANE, *a Civilian*, came the next day to maintain their process; and said, that *redemption* is a species of *salvage*, which is to rescue by force, or redeem by money. He said, the master of a ship represents the owner and freightors; and if he has suspicion, may detain the goods for his freight. But it is objected, that if he has once parted with them, he cannot by process retake: but we say he may; for in this case he has not only single possession, but also an hypothecation of the goods This is a case of *redemption* of goods in the power of an enemy, whereof in some respect they had a property, and might by the law of nations sink and destroy them; so that this *redemption* is a prudent new buying of the goods for the advantage of the freightors, by one that by the law and *custom of nations* (for it is not by the *Rhodian* or *civil law)* ought to redeem for the conveniency of merchants, and advancement of trade; and here the master has actually paid the composition by his body, which he subjects to captivity till it be paid; so that he thereby gains a right and interest in the goods as in goods hypothecated to him, which right follows them in whose hands soever they go.

THE COURT here interrupted him, and said, The merits of the cause was not before them, before appearance and pleading; and it seems very reasonable, that a master compounding for goods under these circumstances, should be satisfied by the owners, &c. (*a*) and it is so in case of pirates, *à fortiori* it ought to be in case of capture by lawful enemies: besides, we are upon a process before libel; and if the process be unlawful, you have a double remedy by law, *viz.* trespass or replevin. And the case of *Captain Sands* was an action upon the statute after the ship was stayed; and it is too early for us, upon motion before appearance or libel, to determine the right of their process; and a citation is a suit within the statute for which action lies against them upon the statute, if they have not jurisdiction of the matter. 1. Salk. 31. 3. Lev. 351. 4. Mod. 176.

POWELL, *Justice*, added: This was only a bare process against ship and goods *in causâ salvagii*, and we will not dispute the legality of it upon motion, since you have your proper remedy, if it be illegal. Vide post. 25. 79. 162. 238. Carth. 26. 32. 166. 294. 398. 423. 474. 518. Skin. 59. 93. 230. 334. 361. &c.

And so, PER TOTAM CURIAM, the rule was discharged.

(*a*) See Yates *v.* Hall, Michaelmas Term. 26. *Geo.* 3. that a promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was binding on the owners, although they abandoned the ship and cargo, 1. Term Rep. 73.

Bangley

Case 5. * Bangley *against* Titcombe.

Defendant may be arrested in trover.

NOTE, There must be *special bail* filed in an action of TROVER and CONVERSION.

2. Stra. 1192. 1. Wils. 23. 335. Say. 53. Tid. P. 33. Cowp. 529.

Case 6. Anonymous.

New notice must be given on *new bail* put in. Tidd's Practice, 136. 138.

EXCEPTION was taken to bail, and new bail was put in, and new exception taken to them, but no notice was given thereof; and, Whether notice be necessary? was the doubt in practice.

Bail below put in as *bail above*, cannot be excepted against. 1. Salk. 98, 99. 102. 2. Salk. 608.

ANOTHER DOUBT was, Whether, if the same bail which were taken by the sheriff be put in to the action, they may be excepted against?

Case 7. Dillon *against* Browne.

Qu. Upon warrant to confess judgment, and an agreement to stay execution for a year, how *the year* shall be reckoned. Post. 16. 288. 1. Salk 258. 322. 400. Ld Ray 281. 480. 5. Com. Dig. "Pleader" (T. 2.).

BROWNE gave a warrant of attorney to *Dillon*, to confess a judgment to him; and execution was sued out thereupon.

It was moved to set it aside for irregularity, upon suggestion, that it was agreed between the parties, at the execution thereof, that no execution should be taken out till a year after.

THE COURT reflected upon a *gentleman at the bar* who was said to be advised with in the transaction, because the agreement was not by deed.

But the plaintiff insisted on it, that he had stayed a year, for the warrant was in a long Vacation, and the judgment was entered as of *Trinity Term* before, and the execution was not executed till after *Trinity Term* following: so the plaintiff had waited a year from the judgment entered.

But THE COURT was not agreed, Whether in such case the year was to be reckoned from the date of the judgment, or of the warrant? And the matter of fact being referred to MR. CLERKE, he reported, That there was no such agreement made at the time of the warrant given: so the execution stood.

But *quære*, If, in this case, execution be delayed till after the year, a *scire facias* be not necessary, notwithstanding the parol agreement? In the case of *Booth v. Booth* (*a*), it is held, that it is necessary, although execution be stayed by injunction (*b*).

(*a*) 1. Salk. 322. S. C post. 288. 258. S. C. 7. Mod. 64.
(*b*) See also Withers v. Harris, 1. Salk.

Case 8. Jose *against* Mills.

On a demurrer to a justification in trespass, and conditional damages taken, if entire damages be assessed, and any of the trespasses are ill laid, the judgment shall be arrested as to the whole.—5. Co. 58. Stra. 189. 3. Term Rep. 433.

TRESPASS for taking away two cows, and several loads of wheat, out of the plaintiff's close in *Dale*; *ac etiam* for taking away several other things *de bonis propriis* of the plaintiff, *ibidem*

similiter

similiter inventus. The defendant pleads *not guilty* as to the two cows, and pleads a special plea to the residue; To which the plaintiff demurs.

Jones against Mills.

The issue being first tried, the defendant is found *not guilty*, and contingent damages entirely assessed upon the demurrer.

In trespass for taking two cows at *A.* and also [illegible] of wheat, *the goods of the plaintiff there found*, these latter words apply only to the *wheat*; and therefore the trespass for taking the *cows* is ill laid, in not shewing that they were the goods of the plaintiff.

And in *Michaelmas* was twelve-month, when BRANTHWAITE found the Court against him upon the demurrer, he took

THIS EXCEPTION, That damages were entirely assessed; and yet for some of the things, *viz.* the loads of wheat, they did not appear to be his goods; for the words "*de bonis propriis* of the "plaintiff," shall only go to such things as are after the *ac etiam*; for the goods in the first clause are sufficiently described by giving them *a venue*; and though there be but one *cepit* for both, that will not alter the case; for one verb may as congruously govern both clauses when the property of the goods belongs to several persons as when to one, so that the verb does not *distribute the words "*de bonis* of the plaintiff;" and if the fact were, that the goods mentioned in the first clause had been the goods of a stranger, this had been a good declaration: and for authorities he quoted the case of *Pinkney v. Inhabitants of Rutland*(*a*), where the plaintiff declared upon the statute of HUE AND CRY, that certain persons, to him unknown, assaulted him, and took ten pounds of "the goods of him the plaintiff, and several other "goods in particular out of his possession took;" and it was held, that he should recover for no more than what he expressly laid to be *his* goods, and that what he did not lay to be his own, should be understood to be the goods of a stranger. In the case of *Terry v. Shaduck*(*b*) an action was, *quare clausum fregit* of the plaintiff and twenty load of hay *ibidem inventus* took away, and after verdict the judgment was arrested, because it was not laid that the hay was the plaintiff's.

*[15]

S. C. 2. Salk. 640 S. C. 2. Ld. Ray. 890 1 Ld Ray 239. 5 Com. Dig. "Pleader" (3 M 9).

WARD, *contra*, quoted 2. *Rol. Abr.* 250. *pl.* 7. Trespass wherefore the defendant at *Dale* "*clausum suum fregit, et intravit, et solum querentis adtunc et ibidem effodit, et mille carectat. soli ad* "*valenc.* 10*l. et centum pecias maremii ipsius querentis ad valenc'* "200*l. adtunc et ibidem inventus cepit*:" and it was held, that *ipsius querentis* should go to *carect. soli*, as well as to *pecias maremii*; and he quoted the writ in THE REGISTER, "*quare liberam wa-*"*rennam* of plaintiff *fregit, et cuniculos cepit*," without saying *suos*, or *in ea* (*c*). In the case of *Rivers v. Odskirt* (*d*), trover for forty shillings in money in a certain purse, as for his proper goods, without saying the purse was his; yet, after entire damages, and the exception moved in arrest of judgment, the plaintiff had judgment.

11. Co. 116, 117.

(*a*) 2 Saund 379

(*b*) 2. Lev 156. S C 1. Vent 278 S. C. 3 Keb. 524.

(*c*) See Year Book 43 *Edw* 3 pl. 13.

(*d*) Cro El z 568. See Maynard v. Basset, Moor, 691

Jose *against* Mill.

The Court immediately agreed this last case to be law; for the purse shall necessarily be intended to be his whose the money was.

Holt, *Chief Justice*, held the exception fatal, but the rest would be advised.

The case being stirred again in Trinity Term, all the Court held the exception fatal, and said the case was no more than this: A plaintiff in trespass declares, that the defendant took away two cows from his land in *Dale*, and also two horses of the goods of the plaintiff from the said *Dale*; so that laying *a venue* for the taking of the two cows closes up the sentence, and interrupts it, being coupled with the second sentence, or the matter of description which follows; and the plea does not confess them to be the goods of the plaintiff, for that only justifies the taking; which might well be, though they were the cattle of a stranger; and relied on the case of *Cutforthay v. Taylor* (a), and *Terry v. Stradwick* (b). And the case of 2. *Rol. Abr*. 250. was agreed for good law, but not like this, for there was but one *venue* for both; and then the question was, Whether the judgment should be for the defendant for all, in which case he must have full costs, or only for defendant upon the issue, and a *nil capiat per billam* upon the whole demurrer, so as the plaintiff should not be finally barred, but might begin *de novo?* For if it were not for the entirety of damages upon the demurrer, the defendant should have judgment for what was ill declared, and the plaintiff for the rest.

Hob. 82.

Cro. Jac. 46, 47.
Yelv. 36.

3. Bulst. 303.
2. Lev. 20.

And now this Term the Court gave judgment final for the defendant upon the issue; and as to the whole demurrer, *nil capiat per billam quia narratio præd. minus sufficiens, &c.* that is, such a judgment as is upon an arrest of judgment.

(a) Ray. 395. (b) 2. Lev. 156.

*[16]

Case 9.

* Anonymous.

If an attorney appear without warrant, the appearance is good; but he is liable to an action. S. C. 1. Salk. 88. Post. 42. 86. 1. Salk. 86. 5. Mod. 205. Fitzg. 191. 1. Term Rep. 62.

If an able and responsible attorney appear for another without a warrant, and judgment is against him, the judgment shall stand, and the party shall be put to his action against the attorney; but if the attorney be a beggar, or in a suspicious condition, the Court will set aside the judgment.

Case 10.

Holderstaffe *against* Saunders.

An attachment will not lie in the first instance against an attorney for procuring one to be turned out of quiet possession.—S. C. Post. 73. S. C. Holt, 136. Savil, 31. 1. Com. Dig. "Attorney," (B. 15.) Stra. 402. 705.

Hooper, *Serjeant*, moved for an *attachment* against an attorney and some others, who had got one in quiet possession turned out, thus:

He got one to come upon the land, who assumed the name of the *tenant in possession*, and owned himself to be the man, and

got

got the *common affidavit* of service to him by the borrowed name, as *tenant in possession*, having delivered a declaration to him before, and thereupon got judgment against the *casual ejector*, and turned the tenant, who was wholly ignorant of all, out of possession.

HOLDERSTAFFE *against* SAUNDERS.

Upon affidavit of this matter, all the accomplices were ordered to attend; for though the Court looked upon it as a very great offence, they would not at first grant *an attachment*; but said, that it being in a criminal matter, if endeavours were used to serve them with the rule, and they could not be found, upon affidavit of that matter, they would grant *an attachment*, without requiring personal service.

HOOPER, *Serjeant*, then insisted to have it part of the rule, that they should not move for *an injunction* in chancery in the mean time, for that would hinder the further inquiry of this practice.

If persons fraudulently procure a man to be turned out of possession by means of a *fictitious ejectment*, and a rule is granted to shew cause why an *attachment* should not issue, the Court will not make it part of the rule, that they shall not move for an *injunction* in the mean time.

But THE COURT said, they could not do that, for that would be to send an *injunction* into chancery; but they said, that when the Court had a hank over a man, and he came for a favour to the Court, they often refuse to grant him that, without he consented not to go into chancery; and that if after such consent he would go, they would send *an attachment* against him for a contempt.

And HOLT, *Chief Justice*, said, Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that if they did, this Court would break it, and protect any that would proceed in contempt of it: and he said, he thought that copies of these affidavits upon which the rule was made here, and an oath of their being true copies, ought to be ground sufficient to stay the chancery from granting an injunction.

Anonymous.

Case 11.

Attachment of privilege by THE MARSHAL.

IN an attachment of privilege by THE MARSHAL, he shall have no attorney, because present in court.

Anonymous.

Case 12.

Confessing an indictment.

A CLERK IN COURT may confess an indictment for his client.

Ante, 14. 1. Bac. Abr. 187.

* Cornish *against* Marks.

Case 13.

In action against *husband* and *wife*, he alone is liable to be arrested. 1. Lev. 1.

IF *a feme covert* be arrested, let the cause of action be what it will, she shall be discharged upon common bail (*a*). But if the *husband* be arrested, he shall not be discharged by giving bail for himself, without giving of it for his wife likewise (*b*).

1. Mod. 8. Post. 86. 105. Tidd's Pract. 49. 1. Bac. Abr. 211.

(*a*) Roberts *v.* Andrews and his Wife, Stra. 1272. 2. Bl. Com. 720.

(*b*) 1. Salk. 115. 7. Mod. 10.—But see Clerk *v.* Nutt and his Wife, 1. H. Bl. Rep. 235. *contra.*

The

Case 14. The Queen *against* Bethell (*or* Porter).

If a defendant be convicted at the sessions on an indictment for a misdemeanor, and a *capias pro fine* be issued against him, he shall not have a *certiorari* to remove the record; and if one hath issued, the Court may grant a *procedendo*; but, on convictions where a *writ of error* does not lie, the Court will, in general, grant a *certiorari* after verdict and before judgment.

THE DEFENDANT was convicted upon an indictment before justices of the peace, and, not being present, no judgment could be given; but a *capias pro fine* was awarded; and then he by a *certiorari* removed up the conviction.

NORTHEY, *Attorney General*, moved for a *procedendo*; because he said, *certiorari's* usually went to remove *indictments*, &c. before trial, but not to remove *convictions*; for the consequence of that would be mischievous, that this Court, which having not tried the cause could not be truly apprized of its nature, should set the fine, which ought by law to bear some proportion to the quantity of the offence.

But BROTHERICK first said, that it was very frequent to remove *convictions* before judgment, and that in this case there could be no inconvenience in point of setting the fine; for it being upon 13. & 14. *Car.* 2. c. 11. the fine is ascertained thereby, *viz.* a year's imprisonment, &c.

S. C. Sett. & Rem. 220.
S. C. Holt, 157.
S. C. 2. Ld. Ray. 937.
S. C. 1. Salk. 149.
Post. 33. 40. 61. 83.
1. Vent. 33. 171.
1. Sid. 419.
1. Cro. 314. 377.
Andr. 27.
Stra. 849. 900.
1. Bl. Rep. 233.
2. Burr. 1042.
2. Term Rep. 735.

HOLT, *Chief Justice.* The writ of *certiorari* goes every day to remove convictions, on which a *writ of error* does not lie, for that is the party's only remedy, and the reason regularly why *convictions* are removed by *certiorari*: but *certiorari's* have also gone where a *writ of error* would have lain to remove *a conviction*; as to plead a pardon, or for other special reason (*a*). And he remembered a case in CHIEF JUSTICE SCROGGS' time, where a *certiorari* was sent out of this court to remove *a conviction* upon an indictment before judges of assize, and that the Court gave judgment; it was for *words* (*b*); and there a *writ of error* would have lain; for wherever *a conviction* is upon an indictment, a *writ of error* will lie thereof. And he said, the course of THE CROWN OFFICE was to remove judgments of attainder, &c. by *certiorari*, and bring a writ of error *coram nobis*; and so it was in the case of *Mr. Hampden* and several others. But there being no such special reason in this case, let a writ of *procedendo* go (*c*).

If a *new penalty* be added to an *old offence*, the indictment must be *contra formam statuti*.

And here THE COURT said, that where a statute takes notice of a common-law offence, and adds a further penalty, an *indictment* thereupon may well be laid to be *contra formam statuti*.

The sessions can only proceed as a court.
2. Sid. 32.
1. Vent. 33. 39. 171.

And that where the act gives justices power generally to determine a matter at THE SESSIONS, it must be according to law, and as a court.

(*a*) See Zink *v.* Langton, Dougl. 749.

(*b*) But see Rex *v.* Baker, Carth. 6. *contra.*

(*c*) See Rex *v* Nicolls, Easter Term, 18. *Geo.* 3. that a *certiorari* shall not issue to remove an indictment for a conspiracy from the sessions after conviction and before judgment, 2. Strange, 1227.—See also Rex *v.* Sparrow, that the Court will not grant a *certiorari* to a defendant after he has appealed to the sessions pending the appeal, 2. Term Rep. 196. *notis.* Dougl. 553.

The

* The Queen *against* The Warden of the Fleet. Case 15.

THE RECORD of issue and pleading coming hither in *Hilary Term*, in the eleventh year of *William the Third*, was, through mistake, put upon the file of *Michaelmas Term*.

Mistakes in filing records rectified.

Post. 164. 268. 275. Stra. 141. 261. 833. 1077.

But IT WAS ORDERED to be put on the right file, the mistake appearing plain to the Court.

And POWELL, *Justice*, quoted two cases where *venires* were to wrong records, but set right by the Court.

White's Case. Case 16.

DEE moved for a *mandamus* to restore *White* to the place of clerk to THE COMPANY OF BUTCHERS in *London*; it being alledged, that this was a charter-office, in which the party had a freehold: and he quoted the case of an attorney of an inferior court, where it goes.

A *mandamus* does not lie to restore a person to the office of clerk of a Coampany.

S. C. 3. Salk. 232. S. C. 2. Ld. Ray. 1004. 5. Mod. 404. 452. 1. Vent. 82. 331. Fitzg. 123. 194. Stra. 159. 557. 797. 1082.

HOLT, *Chief Justice*. That case differs from this: For, FIRST, the office of an attorney concerns the public, for it is for the administration of justice: and, SECONDLY, he has no other remedy. But yours is altogether private; and if it be a freehold, you may have *an assise* or *an action on the case*; and a *mandamus* ought not to go where the office is private, or where the party may have *an assise*. Indeed it has gone for a *register* in an ecclesiastical court, but it was against my will (*a*).

(*a*) S. C. 3. Salk. 232. agrees, that the *mandamus* was denied; but S. C. 2. Ld. Ray. 1004. says, that in Trinity Term the *mandamus* was granted; for the Court said, it was the same case with that of a *town-clerk*, for which see Poph. 176. 1. Vent. 77. 82. Stiles, 457. 1. Sid. 14. But as to the principal point see Rex *v.* Mayor of London, 2. Term Rep. 182. *note*, and Rex *v.* Mayor of London, 2. Term Rep. 177.

Anonymous. Case 17.

NOTE. It is A RULE OF THE COURT, that if issue be joined four Terms, and no proceedings thereupon by the plaintiff, there ought to be a Term's notice before trial.

If, after issue joined, no proceedings by the plaintiff be had for *four Terms*, the defendant is intitled to a *Term's notice* of trial, and the Term in which the issue is joined is *inclusive*; but notice at any time within *the year*, though countermanded, is a *proceeding* within four Terms. Post. 57.—1. Mod. 1. 1. Salk. 457. 2. Salk. 645.

A case happened, that issue was joined in *Trinity Term*, and notice of trial in *Hilary Term*; but it was afterwards countermanded, and a new notice given in the *Trinity Term* after, and the issue tried at the ASSIZES.

And it was now moved to set aside the verdict as irregularly obtained.

THE FIRST QUESTION was, Whether the Term of which issue was joined should be reckoned one of the four Terms? for

ANONYMOUS. if it ſhould, this trial was irregular; in caſe the notice in *Hilary Term* was not to be looked upon as a proceeding, then the trial had been irregular, and as ſuch ought to be ſet aſide.

And PER CLERICOS OMNES, the Term of which the iſſue is joined is not to be reckoned one of the four Terms.

(a) See Wilbourne *v.* Nixon and Others, 2. Term Rep. 40.

And PER EOSDEM, notice of trial any time within *the year*, though after countermanded, is a ſufficient proceeding to bring the plaintiff out of the rule; for the end of the rule is, that the defendant ſhould be put in mind of the cauſe, which a notice, though countermanded, does *(a)*.

Ancient rule of fourteen days notice to be obſerved.

IT WAS ALSO HELD by *the Court* and *the clerks*, that the right and ancient courſe is, that if THE ASSIZES happen within fourteen days after Term, fourteen days notice is not requiſite; but that where it could be, it ought to be; that is, where THE ASSIZES do not happen within fourteen days.

But IT WAS AGREED now, that they uſed to give but eight days notice of trial, though the cauſe lay ever ſo remote.

THE COURT ſaid, this was very miſchievous; and therefore it was ordered to obſerve the old rule.

If a cauſe ſleep four Terms before iſſue joined, there muſt be a Term's notice.

If a cauſe ſleep four Terms before iſſue joined, there muſt be a Term's notice before judgment can be ſigned: if after iſſue joined, there muſt be like notice before trial; but to make the notice regular within the four Terms, it muſt be within the laſt Term *ſedente Curiâ*.

Poſt. 57.
2. Salk. 650. 5. Com. Dig. "Pleader" (R. 17.).

*[19]

Caſe 18.

* Crowder *againſt* Oldfield.

A declaration, in an action on the caſe, for diſturbance of common, ſtating, that the plaintiff was *ſeiſed* of lands parcel of ſuch a manor, and that he held them by copy of court roll as a cuſtomary tenant, according to *the cuſtom* of the ſaid manor, and that he had, in reſpect thereof, a *right of common* by cuſtom on ſuch a part of the manor, is good, *after verdict*; for, as the lands are alledged to be *parcel of the manor*, they ſhall then be intended *copyhold*, though the eſtate is not repreſented to be held at *the will of the lord*.—S. C. 1. Salk. 170. 364. S. C. 3. Salk. 13. S. C. N Lut. 46 S. C. Holt, 146. S. C. Lex. Man. App. 130. S. C. 2. Ld. Ray. 1225. S. C. Ray. Ent. 489. 9. Skin. 406. Carth. 432. 83. 270. Poſt. 63. 313. 4. Mod. 418. 12. Mod. 35. 1. Ld. Ray. 386. 406. 2. Ld. Ray. 1145. 1231. 5. Com. Dig. "Pleader" (C. 39.). 3. Bac. Abr. 394.

UPON a writ of error from the common pleas the caſe was thus:

The plaintiff, in an action on the caſe for hindering him of his common, declared, that he was ſeiſed of a meſſuage and ten acres of land, with the appurtenances, in *Northram*, in the county of *York*, parcel of the manor of *Northram*, in the ſame county, and that he held them by copy of court-roll of that manor as a cuſtomary tenant in fee-ſimple, according to the cuſtom of the ſaid manor; and that he, the plaintiff, had and ought to have, &c. and all the cuſtomary tenants of his ſaid tenement, with the appurtenances, by the afore-

ſaid cuſtom, *præd. a tempore cujus*, &c. uſed and approved, had, and ought to have, a *common of paſture* in a certain paſture or moor called *Warmlees* parcel of the ſaid manor, and containing forty acres in *Northram* aforeſaid, for all his commonable cattle, upon the ſaid cuſtomary tenement *levant et couchant*, &c. as appurtenant to his ſaid tenement; and that the defendant at ſuch a time, with intent to deprive him of his ſaid common, did incloſe parcel of the ſaid place, &c.

Upon *not guilty*, there was a verdict for the plaintiff; and the judgment was arreſted in the common pleas, becauſe he made a title by *cuſtom*, and did not ſhew that he was a copyholder; for he did not ſhew that he held *ad voluntatem domini* (*a*).

LUTWYCHE, *junior*, *for the plaintiff* in error.

FIRST, None can claim common by cuſtom generally but a copyholder; and he ought, in making title, to ſhew his eſtate to be a copyhold, that is, *demiſed and demiſable*, and held *ad voluntatem domini*, &c. (*b*). But this is an action upon the caſe againſt a ſtranger, and upon the poſſeſſion.

SECONDLY, It is *after verdict*; and the laying *a cuſtom* is, in this caſe, only an inducement to the action; and inducements need only be ſet out in ſubſtance, for the wrong done to our poſſeſſion is the gist of the action: and he quoted the caſes of *Dent v. Oliver* (*c*), *St. John v. Moody* (*d*), *Saunders v. Williams* (*e*), *Baker v. Brereman* (*f*), *Bayley v. Hughes* (*g*), *Sands v. Trefuſis* (*h*), and *Stroud v. Bird* (*i*). And though it be laid by way of cuſtom, and ill as ſuch, it may be well by preſcription, according to the caſe of *Day v. Savage* (*k*), and the caſe of *Eſcot v. Lannery* (*l*), where, in caſe, the plaintiff declared, that *Lord Berkley* demiſed to him all his fairs for twenty-one years, and that the defendant hindered him from taking his toll; and though it was excepted, that he had not laid any title in *Lord Berkley*, yet becauſe it was upon *the poſſeſſion*, in which the right did not come in queſtion, the plaintiff had judgment. In the caſe of *Merchant v. Whitpane* (*m*), in caſe, for diſturbance of a ſeat in the church, without ſaying it was an ancient one, the exception was over-ruled, becauſe it was againſt a wrong-doer and upon the poſſeſſion. In an action on the caſe (*n*) for diſturbance in an office, to which the plaintiff made a ſpecial title, and the jury found a title variant, yet plaintiff had judgment, becauſe the title was not material. * A verdict will ſupply whatever muſt of neceſſity have been proved at the trial (*o*); and he quoted the caſe of *Roſwell v. Pryor*, in *Trinity Term*, in the tenth year of *William the* [20]

(*a*) See this caſe in the common pleas, 1. Lutw. 125.
(*b*) Foiſton *v.* Cratchrod, 4. Co. 31.
(*c*) Cro. Jac. 43.
(*d*) 1. Vent. 275.
(*e*) 1. Vent. 319.
(*f*) Cro. Car. 418.
(*g*) Cro. Car. 137.
(*h*) Cro. Car. 575.
(*i*) In Mich. Term, 7. *Will. & Mary.*
(*k*) Hob. 86.
(*l*) Owen, 109.
(*m*) 2. Lev. 193.
(*n*) Farrar *v.* Johnſon, Cro. Eliz. 336.
(*o*) See Spires *v.* Parker, 1. Term Rep. 141. 145. Dougl. 682. *notis.*

 Third,

CROWDER *against* OLDFIELD. *Third* (*a*), in nuisance for stopping of lights, where it was not said to have been an ancient messuage, and yet held well after verdict: besides the *locus ad quem* here is laid to be parcel of the manor, which the
Post. 313, 314. freehold is not, and the copyhold is; for the services whereby the freehold is holden is that which is part of the manor, and not the freehold itself; and for this he quoted the case of *Winter v. Loveden*, in
2. Salk. 437. *Michaelmas Term*, in the ninth year of *William the Third* (*b*). *Br. Maner*. 2. 2. *Vent*. 18. *Vide Raym*. 101. 2. *Keb*. 410. 493. 504.

PARKER *contra*. This case has been three times solemnly argued in the common pleas, and the whole Court were unanimous in their opinion against the plaintiff; for, as he has made his case, he has a freehold in the *locus ad quem*; for tenant of land *secundum*
Cro. Car. 185. 229. *consuetudinem manerii* shall be understood a freeholder. 2. *Vent*. 143, 144. 9. *Hen*. 6. 29. 4. *Co*. 31. *b*. *Foiston's Case*. 2. *Leon*. 29. *Vaugh*. 253.

SECONDLY, The verdict cannot help it; for where the title is inconsistent, the verdict cannot mend it; and the question here is, Whether a tenant of a freehold holden of a manor may by custom have common in parcel of the manor? *Cro. Car*. 418, 419. *Cro. Eliz*. 180.

HOLT, *Chief Justice*. The question first is, Whether we shall understand this customary estate, as pleaded, to be a copyhold estate? Of right you should not only have shewed, that it was by custom
5. Mod. 244. 378. held at the will of the lord, but also demised and demisable by him
Co. Lit. 58. to hold of him, &c. Indeed you say, that it is part of the manor, which is a kind of an implication that it is a copyhold; and take it so, you have gone, in making title, by way of a *que estate*, that all the customary tenants of the messuage, &c. used to have common there; and that is a good way of prescribing, though it be not the usual way. Then you say you ought to have it, as belonging to the land; but if it be looked upon as a copyhold it is not so, but it belongs to it as it is a copyhold estate; and if the copyhold be infranchised, there is an end of the common: so that, it being alledged by custom, it is not a common belonging to the land, but to the state of the land. *Vide Yelv*. 189. 119. *Massam v. Hunter*, *Cro. Jac*. 253. and abundance of other books; but a copyholder may have common as appendant to the land.
Hob. 86. 286. 1. Jo. 276. 28. If copyholder of one manor has common in waste of another manor, then he must prescribe in the name of his lord, and say, that the lord of that manor whereof he is copyholder, used, time out of mind, to have common for him and his copyholders; and there infranchisement of copyhold does not extinguish the common, but it is a derivative right which the copyholder has: so if this be taken as appendant to land, infranchisement will not extinguish
Hob. 86. it; so your declaration is repugnant, for you have averred it to be parcel of the manor, and so by implication a copyhold: and then the title you shew is very bad, and such as a copyholder cannot

(*a*) Post. 116. S. C. 2. Salk. 459. S. C. Carth. 454. S. C. 1. Ld. Ray. 392. 713. S. C. 12. Mod. 215. 635.

(*b*) 2. Salk. 537. S. C. Carth. 427. S. C. 5. Mod 244. 378. S. C. 1. Ld. Ray. 267. S. C. 1. Freem. 507. S. C. Com. Rep. 37.

make;

make; for you should have shewed that the custom of the manor was, that every copyholder of this tenement, or of the manor in general, used to have common, &c. Crowder *against* Oldfield.

* Powell, *Justice*, who was of the common pleas when judgment was there given, agreed, that one may declare in an action for damages upon his *possession*, without any further title against *a wrongdoer*; and he agreed the case of *Burt v. Stroud*, upon *a legitime possessionatus* for hindrance of common, to be good, because it was against a stranger and a wrongdoer; but against the *owner of the soil* you must make *title*; and so in *bar* and *avowry*; but where you need not shew any *title*, if you go about it, and shew an ill or repugnant one, it is at your peril: here your title is, that you are a customary tenant of a customary tenement, parcel of a manor; and it is true, after verdict, that will be taken to be *a copyhold*: and if so, you are gone that way; for you make title to the common as belonging to *the land*, whereas it should be as to *the estate*. * [21] 4. Mod. 418.

And the whole Court was clear to affirm the judgment: but at the importunity of the Counsel they gave leave to speak to it again.

Adjournatur (a).

(*a*) In Hilary Term, 4. *Anne*, the Court, after great deliberation, reversed the judgment of the court of common pleas, and gave judgment for the plaintiff, the fault in the declaration being helped by *the verdict*. S. C. 2 Ld. Ray. 1231.

The Mayor of Winchester *against* Wilks. Case 19.

An action upon the case was brought against *Wilks* for using the trade of a *woollen-draper* within the corporation of *Winchester*, contrary to the *custom* thereof; which was, that none who had not served seven years to a trade, or had been free of the guild of merchants, should use it within the corporation.

Quære, Whether a *custom* that no persons, except those who are free of the city, shall exercise a trade therein, be good.

Note, It was not grounded upon any bye-law, or for any penalty.

After verdict for the plaintiff, a motion was made in arrest of judgment, that such action does not lie; and *Cro. Eliz.* 803. and the *Case of the Corporation of Totness* were cited upon the point.

But the postea being not put in, the Court ordered them to stay till it came in, and then to have it put in the paper, and solemnly debated.

For Holt, *Chief Justice*, said, it was a point not determined, whether such a custom be good, though many corporations pretended to it: and he said, that some corporations pretended to a right by custom to exclude foreigners, but he thought they could not support it.

S. C. 1. Salk. 203. S. C. 3. Salk. 349. S. C. Holt, 187. S. C. 2. Ld. Ray. 1129. 11. Co. 53. 1. Leon. 262. Palm. 1. 2. Lev. 33. 1. Salk. 193. 6. Com. Dig. "Trade" (D. 2.).

And in *Easter Term*, in the fourth year of the queen, judgment was stayed upon faults in the declaration (*a*), and the Court de-

(*a*) See S. C. 2. Ld. Ray. 1129.

clined

THE MAYOR OF WINCHESTER *against* WILKS.

clined saying any thing upon the merits, which they said was a question of great consequence.

Case 20.

Hothershell *against* Bows.

A prisoner retaken on escape, cannot pay money into court. Post. 301.

THE DEFENDANT being in custody upon *mesne process*, and having escaped, was taken upon a warrant by virtue of the late act of parliament, 5. *Anne*, c. 9.

RAYMOND moved, that, upon bringing the money into court, he should be set at liberty.

But THE COURT said, they could not do it.

Declaring against one that comes in by *hab. corpus*. S. C. Holt, 705. 2. Salk. 352. Post. 254. Tidd, 200.

MR. CLERKE, upon this occasion, said, that if a man come upon a *habeas corpus*, and the plaintiff do not declare in two Terms, the defendant shall be discharged upon filing of common bail without any rules; and if one come in upon *habeas corpus*, though he after put in bail, if it be not at the return of the process he cannot give rules, but * must wait two Terms, and then, if there be no declaration, he shall be discharged upon common bail, without costs; whereas if he had put in bail at the return of the process, he might spur them on by rules; or if the plaintiff had without rules passed two Terms without declaring, he should pay costs.

*[22]

5. Com. Dig. "Pleader" (C. 2.).

And THE COURT said, the rules were very hard upon one in custody; and they said, it was not the intent of the act to make escaping prisoners pay the debt right or wrong, or to lie in jail for ever.

Vide Post. 63. 95. 154.

And therefore ordered MR. CLERKE to draw up a rule, that in case a plaintiff did not declare in two Terms he should be *nonpros'd*.

And thereupon the defendant discharged.

Case 21.

Anonymous.

Rules upon a declaration delivered in Hilary Term. Post. 33. 153. 1. Salk. 219. 2. Salk. 514, 515. 518.

NOTE, If a declaration be delivered of *Hilary Term*, and rules of pleading given, if the defendant do not plead before the *essoin-day* of *Easter Term*, the plaintiff may sign judgment for want of a plea; but if the plaintiff in that case has not given rules in *Hilary Term*, he must give them in *Easter Term* before he can sign judgment.

Case 22.

Anonymous.

No new trial after second verdict on the same side. 2. Salk. 649. Post. 242. 5 Com. Dig. "Pleader" (R. 17.).

PER HOLT, *Chief Justice*. After a second verdict on the same side, it is not fit to grant *a new trial* because the Judge did not like the verdict; but if there were any practice used in obtaining it, it is otherwise (*a*).

(*a*) See the case of Goodwin *v.* Gibbons, 4. Burr. 2108.

Anonymous.

Anonymous. Case 23.

PER HOLT, *Chief Justice.* If A BOND be of twenty years standing, and no demand proved thereon, or good cause of so long forbearance shewn, upon a *solvit ad diem* I shall intend it paid; *à fortiori* upon A NOTE, if it be any considerable sum.

A bond or note of *twenty years* standing shall be *presumed* paid.

Ld. Ray. 1033. 8. Mod. 278. 10. Mod. 2. Gilb. Eq. Rep. 224. 3. Peer. Wms. 288. Strange, 826. 1. Burr. 434. 4. Burr. 1963.; and see Oswald *v.* Legh, 1. Term Rep. 270. *in point.*

Warren *against* Fuzz. Case 24.

PER CURIAM. A new trial ought not to be granted for want of evidence which the party might have had at trial, and had not; but if it be proved that endeavours have been used, but prevented by some unforeseen accident, as sickness of the witness, &c. it may be good cause of new trial. See the case of *Ford v. Tilly*, 2. *Salk.* 653. *Faresl.* 156, 157.

The Court will grant a *new trial* if material witnesses were prevented from attending.

Post. 222. 224.

8. Mod. 220. 288. 325. 10. Mod. 202. 11. Mod. 111. 118. Fitzg. 40. Strange, 691. 5. Com. Dig. "Pleader" (R. 17.).

Noell *against* Gray. Case 25.

ONE who had been discharged upon the act of poor prisoners, gave bail to an action of debt upon a bond with which he was charged in prison, and confessed the action, and that execution might go against his goods, &c. The plaintiff takes execution against the goods, and likewise sues the bail, who surrender their principal in discharge; and this appearing upon motion,

Bail are discharged by their principal having the benefit of an insolvent debtors act.

Post. 301.

THE COURT said, that bail were actually discharged by the pleading and judgment, and ordered him to bring the record of the judgment into court whereupon he was taken in execution, and that they thereupon would discharge him.

1. Salk. 345. 2. Salk. 521. Ld. Ray. 1088. Stra. 1233.

*[23]

* Baker *against* Pierce. Case 26.

ACTION ON THE CASE for these words: "You stole my "box-wood, and I will prove it."

To say, "You "stole my box-"wood, and I "will prove it," is actionable.

DARNELL moved in arrest of judgment, that the words are not actionable; for he urged, that the words "You stole my wood," and "You stole my timber," are the same (*a*): "You are a thief, "and stole my timber (*b*):" "You are a thief, and stole my corn, "hops, apples," not actionable (*c*). For where words charge one either with trespass or felony, if there be not other words that shew the charge to be felony, the best sense shall be taken. So if it be, "You stole my timber out of my yard (*d*), hops out of my bag (*e*), "corn out of my yard, &c. (*f*)," it will not bear action (*g*).

S. C. 2. Salk. 695. S. C. Holt, 654. S. C. 2. Ld. Ray. 959. Post. 104. 201. 1. Jones, 11. Allen, 11. Poph. 211. Hob. 305.

(*a*) Cro. Jac. 65. Stiles, 24.
(*b*) Cro. Jac. 65.
(*c*) 2. Brownl. 280. Cro. Jac. 673.*;
(*d*) Allen, 31. Hob. 331. Stiles, 231.
(*e*)
(*f*) Hob. 406. Cro. Jac. 39.
(*g*) See Clearke *v.* Gilbert, that "Thou "art a thief, and hast stolen twenty loads "of my furze," are not actionable, Hob. 331.

I charge

BAKER *against* PIERCE.

"I charge you with felony for taking money out of *J. S.*'s pocket," not actionable (*a*), because it might be without a felonious intent. (But HOLT, *Chief Justice*, condemned that authority.) Besides, he quoted *Hutton*, 113. "Thou art a thief, and hast couzened my "cousin of his land," not actionable, though it was said, the subsequent words were accumulative, and there all the aforesaid cases are agreed not to be actionable. Suppose the words were, "You "have stolen my coppice-wood (*b*)," will they say an action would lie? for it might be coppices cut and carried away with one entire act. So here; for it is not what the party meant here, but the necessary import of the words that are to be considered.

BROTHERICK *contra*. "You have stolen my timber" is actionable (*c*), for it must be felled and severed from the stock before it is timber. And he remembered the old verse of *Arbor dum crescit, lignum dum crescere nescit* (*d*). These words, "Thou "hast stolen my wood, and I will charge you with felony (*e*)," and, "Thou art a thief, and thou hast stolen a tree (*f*)," not actionable, for a diversity is taken by the Court between a tree, for that should be understood standing, but if it be felled it is wood: 1. Com. Dig. 252. and a *præcipe* does lie of *boscum* (*g*); but it cannot be said, one "stole an acre of wood;" and if it were not a thing of which felony could have been committed, we could not have a verdict. See the case of *Low v. Saunders* (*h*) upon demurrer.

HOLT, *Chief Justice*. The verdict signifies nothing in the case, and there are contemporary authorities that differ from my brother DARNELL's. Suppose he had said, "He has stolen my "underwood?"

POWELL, *Justice*. Underwood and coppice-wood will be taken for wood standing.

8. Mod. 24. 30. 371. 10. Mod. 197. Stra. 142. 696. 304. 1189.

HOLT, *Chief Justice*, said, the opinions of later times have been in many instances different from those of former days in relation to words, for formerly there has been a difference taken between saying, "*Thou art a thief, *and* hast stolen my wood," and, "Thou art a "thief, *for* thou hast stolen my wood (*i*);" and judgments have *[24] gone both ways; but later opinions make no difference, if the words be spoke at the same time. And these are scrambling things that have gone backwards and forwards, and the idle people in the country that privately cut and carry away coppice-wood are in common parlance called *wood-stealers*. And I have heard my LORD HALE and JUSTICE TWISDEN say, that they knew no set rule for actions for words, but that all words stood upon their own feet (*k*). To say, a man has "*the pox*" is not actionable (*l*), but to say he has it, and got it by a yellow-haired wench in *Moor-*

(*a*) Mason v. Thompson, Hutton, 38.
(*b*)
(*c*) Yelv. 152. Noy, 114.
(*d*) 1. Roll. Abr. 70. pl. 47.
(*e*) March, 211. Cro. Jac. 116.
(*f*) Hob. 77.
(*g*) Anonymous, Stiles, 9.
(*h*) Cro. Jac. 166.
(*i*) See Hob. 331. and Cro. Jac. 114.
(*k*) 1. Mod. 22. 1. Lev. 280. 1. Sid. 432. 1. Vent. 50. 1. Cro 509.
(*l*) 1. Com. Dig "Action for Defa- "mation" (D. 29.).

fields,

fields, has been adjudged actionable (*a*); which latter words do not carry a violent intendment that the speaker meant "*the French pox*," but the sense leads more that way than to another (*b*). And he said, that "stealing" and "feloniously stealing" was not the same; for in common parlance "stealing" did not always import felony; as to cut and carry away furze is a stealing, but not a felonious taking (*c*).

BARKER against PIERCE.

But POWELL, *Justice*, said, he always took it that *ex vi termini* "stealing" did import felony, and the said instance put by MY LORD was properly *trespass*, and not *stealing*.

And at another day, PER TOTAM CURIAM, the plaintiff had judgment, for all the later authorities ran clear for him. Cro. Jac. 674 166. 40. *ac.* Cro. Jac. 66. *cont.*

And HOLT, *Chief Justice*, said, it was not worth while to be learned on that subject; but said, that for his part, wherever words tended to take away a man's reputation he would encourage actions for them, because so doing would contribute much to the preservation of the peace.

(*a*) 1. Lev. 205.
(*b*) Hob. 117. 268. 1. Jones, 68.
(*c*) See Hob. 77. 331.

Wood *against* Shepherd. Case 27.

HOLT, *Chief Justice*. One should not move in arrest of judgment until THE POSTEA be brought in; and the defendant should give a rule upon THE POSTEA, which is, in itself, a notice to bring it in; and it is against the ancient course of the Court to make a rule for staying of judgment until THE POSTEA be brought in. By the course of the common pleas, the *clerk of the assize* keeps it until the days for moving in arrest of judgment be past, and the notice is given him, and he has his fee of six shillings and eight pence for attending with it, and the *clerk of assize* ought to deliver THE POSTEA to none but to the clerk in court; and notice to the clerk in court is good notice.

When to move in arrest of judgment.

S. C. 1. Salk. 78. S. C. Holt, 71. 1. Salk. 77, 78. 2. Salk. 431. Post. 143. 5. Com. Dig. "Pleader" (S. 47.).

Anonymous. Case 28.

NOTE, There are twenty days to except against bail after notice.

Twenty days to except against bail.

Post. 230. 1. Salk. 98. Tidd's Pract. 135.

And bail cannot be justified before a Judge in his chamber, except it be by consent, or for necessity in Vacation; but in the latter case, they ought to be justified again in Term.

Bail cannot justify before a Judge, except by consent, but must appear personally in court. Post. 230.—Tidd's Prac. 137. 2. Bl. Rep. 758. 1064.

And upon that the defendant is compelled to accept a declaration to go to trial at THE ASSIZES, if it be an issuable Term.

And

Notice of bail must contain their names, places of abode, and mysteries. Loft, 237. 194.

And upon putting in bail, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade or vocation, that the plaintiff may know how to enquire after them.

Tidd's Pract. 134. 1. Com. Dig. 680.

And after exception to bail, there is * no set time to justify or exchange them for better, but it must be in convenient time.

Case 29. **Butler *against* Rolfe.**

Time of bringing in principal, interest, and costs. S. C. 3. Salk. 55. S. C. Holt, 91.

PER CURIAM. There ought not to be a stay of proceedings upon the bail-bond upon bringing principal, interest, and costs into court after notice of trial, without it be brought within such time as the plaintiff may not be delayed of trial (*a*).

(*a*) See Anonymous, ante, 11. Post. 29. 60. 101. Salk. 583. 597. 7. Mod. 114. 140.

Case 30. **The Queen *against* The Mayor of Thetford.**

At what time the Court will grant *an attachment* for not returning *a mandamus*. 2. Salk. 429. 434. Fitzg. 4. 10. Mod. 56. Stra. 407. 609.

UPON AFFIDAVIT that he had been served with a *mandamus* on the second of *July* before, and made no return,

STONE moved for an *attachment* against him, or at least to have the *alias* returnable peremptorily.

CURIA. It is matter discretionary in the Court to let people run the line out, and we may make the *alias* returnable *immediatè*, and for contempt thereon grant *an attachment*; or, if we see occasion, we may make the first writ returnable, and we may make them returnable *de die in diem*, or we may give short returns; as a *mandamus* returnable in a week, and an *alias* in four days after, and a *pluries* with the like short return (*a*).

(*a*) See Rex *v.* Smithies, 3. Term Rep. 351.; Rex *v.* J. Edyvean, 3. Term Rep. 352.; Rex *v.* Winton, 5. Term Rep. 89.; and 2. Hawk. P. C. ch. 22. s. 34.

Case 31. **Anonymous.**

[Ac]tion for malicious prosecution will not lie, if there be probable cause. Post. 216 261. Ld. Ray. 81. 377. 503.

PER CURIAM. If the person be ever so innocent, yet if there were *a probable cause* of prosecution, an action for *malicious prosecution* will not lie; for it must be direct malice, without any colour of cause, that will support such an action (*a*). *Vide* 1. *Salk.* 14, 15. 21. 5. *Mod.* 394. 405. 1. *Vent.* 86. *Carthew*, 416.

(*a*) Anonymous, post. 73.; Farmer *v.* Sir Robert Darling, 4. Burr. 1971 *accord.*

Ewer

Ewer *against* Jones. Case 31.

For a prohibition to the admiralty to a suit concerning seamen's wages, upon pleading statute of Limitations.

DEE moved for *a prohibition* to THE COURT OF ADMIRALTY to stay a suit there for seamen's wages.

The contract was upon land, and the suggestion was, that they pleaded the statute 21. *Jac.* 1. c. 16. of *Limitations*, and that THE ADMIRALTY rejected their plea.

And having obtained a rule *nisi* before, it was now offered against it, that wherever the common-law courts allow THE ADMIRALTY jurisdiction, they ought not to prohibit them; and here they have jurisdiction, as in case of *hypothecation*; and a sentence in the court of admiralty beyond sea shall be executed by the court of admiralty here. In *Bridgman's Case* (*a*), suit to seize a ship for piracy done by the mariners; and though they may sue at common law in this case, yet it is hard to make them do it; for it were in effect to give away their right; for at common law the suits must be all several, whereas they may all join in THE ADMIRALTY, and so by an easy contribution maintain and carry on the suit; and besides, they may sue the ship there, which they cannot do at common law; and the *statute of Limitations* enumerates the actions it limits, and they are all suits at common law. It is no bar to a suit in equity (*b*) upon a trust, nor for a legacy, nor * upon a *rationabili parte bonorum*; and the reason given for the latter case is, because it is not a common-law proceeding, but according to a particular custom, and *à fortiori* when the proceeding is by the civil law. *Mar.* 139. 132. *Hutt.* 109.

S. C. 3. Salk. 227. S. C. 2. Ld. Ray. 937. S.C. Comy. 137. Ante, 11. Post. 79. 424. 240. 309. 2. Salk. 415. 424. 1. Salk. 31. 1. Vent. 146. 343. Raym. 3. 2. Roll. Ab. 350. p. 10. 3. Mod. 244. Carth. 166. 518.

* [26]

To this it was answered, that it was an indulgence to suffer seamen to sue in THE ADMIRALTY for wages; for in the time of *King Edward the Third* prohibitions have gone; and it was first agreed, that for a suit upon a contract *super altum mare* a prohibition should go upon their refusing the plea of the *statute of Limitations*; but this was matter strictly cognizable at common law only, in which case this plea had been good: and is it not hard by indulgence to them to have defendant barred of his just plea?

1. Salk. 33. 2. Salk. 425. Winch, 8.

And this was what stuck with THE COURT; and they said, that this being a statute barring of right ought to be taken strictly (*c*).

(*a*) Hobart, 11.

(*b*) See Johnston *v.* Smith, 2. Burr. 961.; South Sea Company *v.* Wymondsel, 3. Peer. Wms. 143. 2. Eq. Cas. Abr. 74.; Wych *v.* East India Company, 3. Peer. Wms. 309.; and Mitford's Pleadings, 2d edit. 212.

(*c*) Now by 4. *Anne*, c. 16. s. 17 "All suits and actions in the court of "admiralty for seamens wages shall be "commenced and sued within six years "next after the cause of such suits or "actions shall accrue, and not after; "PROVIDED that if the person intitled "to such suit or action shall, at the time "it accrues, be within the age of twenty-"one years, *feme covert*, *non compos mentis*, "imprisoned, or beyond the seas, he shall "be at liberty to bring the action within "six years next after coming of age, "being discovert, of sane memory, at "large, and returned from beyond the "seas, &c. &c. &c."

CURIA.

Property bound by sentence in admiralty.

CURIA. Without doubt a sentence in THE ADMIRALTY, where they have jurisdiction, binds the property.

Raym. 473. 2. Show. 232. 1. Vent. 32. 2. Keb. 511. 610. 1. Sid. 418. 1. Lev. 243. 267.

HOLT, *Chief Justice*, remembered the case of *Hughes v. Cornelius (a)*: *France* and *Holland* were at war, and *the French* took an *English* ship as a *Dutch* one, and the ship being sentenced as prize was sold by virtue of the capture; and the first owner brought an action of *trover*, and the sentence was given in evidence, and upon special verdict it was held, that the property was altered by the sentence.

But to the point in question, whether the statute had been well pleaded, they all seemed to incline that a prohibition ought to go upon refusal of it.

A *prohibition* will not lie to THE ADMIRALTY for refusing A PLEA of the *statute of Limitations*, if it be badly pleaded; as, "that it "appeared by "the libel that "the cause of "action did not accrue within six years"—2. Ld. Ray. 838. 1204. Strange, 1078.

But as it was here pleaded it was ill, *viz.* that it appeared by the libel that the suit was six years after the cause of action, which was ill; for the time on which it is laid is not material, and therefore the defendant ought not by his plea to hold the plaintiff to the immaterial time, but to plead directly that no suit had been within six years after cause of action accrued; and if, notwithstanding a matter ill pleaded by you, they go on, why should we prohibit them? Nor shall we rather think that they rejected your plea as not at all allowable by their law as to its matter, than because it was bad in substance, as to the legal manner of pleading it.

Refusing a plea is, by civil law, good cause of *appeal*.

THEY ALSO AGREED, that if they refuse a plea, which by their law is a good plea, it will be reason to *appeal*, but not to *prohibit* them.

And the rule was discharged (*b*).

From what time duty to seamen

NOTE, In case of seamen, the duty does not arise from *the contract*, but from *the service* done; and therefore, though the contract be above six years, and any part of the service be within that time, it is out of the statute.

3. Lev. 60. 6. Com. Dig. "Temps" (G. 6.).

And if a man be beyond sea at the time the debt accrues, he may plead it by way of replication to the defendant's bar of the statute (*c*).

(*a*) Ray. 473. Skin. 59. 2. Show. 2. Ld. Ray. 893. 935. 1. Show. 143.

(*b*) Lord Raymond says, this case was moved again, but that a prohibition was still denied, "but it seemed chiefly "because the defendant had *appealed*;" for that a *prohibition* was granted in Easter Term, between *Hide v. Partridge* in the same case, S. C. 2. Ld. Ray. 937. —See Hide *v.* Partridge, 2. Ld. Ray. 1204. 2. Salk. 424. 3. Salk. 227. 11. Mod. 43.

(*c*) See the 4. & 5. *Anne*, c. 16. f. 18, 19, 20.

Anonymous.

Anonymous.

Case 32.

PER HOLT, *Chief Justice.* If money be devised out of lands, sure the devisee may have *debt* against the owner of the land for the money, upon the statute of 32. *Hen.* 8. c. 1. of Wills; for where-ever a statute enacts anything, or prohibits anything, for the advantage of any * person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the tere-tenant.

Debt lies for money devised out of lands.

S. C. 2. Salk. 415. S. C. Holt, 419. 4. Burr. 2381. 3. Com. Dig. "Debt" (A.). Cowp. 291.

Kingsdale *against* Mann.

Case 33.

POSSESSION was delivered by *habere facias possessionem* about nine o'clock in the morning, and towards six o'clock at night the plaintiff was forcibly turned out of possession: and this matter being set forth by affidavits,

Execution upon *ha. fa. poss.* is not complete till actual possession given.

S.C. 1. Salk. 321. Ld. Ray. 252. 346. 482. 718. 2. Brownl. 253. 4. Com. Dig. "Execution" (A. 5.).

THE COURT held,

FIRST, That upon an *habere facias possessionem* it is not a complete execution until the sheriff or his bailiffs deliver the possession to the party, and are gone away.

SECONDLY, That if, immediately after such execution, the defendant turn him out of possession, it would be a disturbance of the execution, for which *an attachment* ought to go.

A *recent ouster* after possession given is *a contempt.*

S. C. 1. Salk. 321. S. C. Holt, 154. 2. Brownl. 253.

But here they doubted, whether, after so many hours distance, it could be looked upon as a disturbance of execution; and therefore the rule was, to shew cause why *an attachment* should not go.

But if nine hours have intervened the *attachment* shall not go in the first instance. — 1 Keb. 779. 785. a. Stiles, 318. Strange, 830.

POWELL, *Justice*, quoted a case in the common pleas, where, upon an entry upon the plaintiff the same day he had execution, the Court granted a new *habere facias possessionem.*

To which HOLT, *Chief Justice*, answered, so they might, if the first executions were not returned (*a*), otherwise not.

Quod CURIA *concessit.*

A new *ha. fa. poss.* cannot issue, if the former be returned, though not *filed*. Post. 115 2,8. Palm. 289. Runn. Eject. 160 2 Brownl. 216.

(*a*) Run Eject. 159

Case 34. Longvill *against* The Hundred of Thistleworth.

In an action of *hue and cry*, if the defendant plead in *abatement* that the robber was taken, and on demurrer a *respondeas ouster* be awarded, the defendant cannot pray *oyer* of the writ, although in the same Term; for after a plea in *abatement* there cannot be *oyer* of the *original*.

S. C. 2. Salk. 498.
S. C. Holt, 518.
S. C. 2. Ld. Ray. 969.
Dougl. 215. 477.

THE DEFENDANTS appeared, and took a declaration in *Trinity Term*; and the attornies of both sides discoursing about *the original*, the plaintiff's attorney told the defendant's attorney that the original was filed, but he had a copy of it, whereof he gave the defendant's attorney a copy. The defendant's attorney pleads *in abatement*; and after a *respondeas ouster* awarded by the Court, he gives the plaintiff's attorney a plea, setting forth an *oyer* of the original therein.

The question was, Whether the plaintiff should be obliged to receive this plea, all this having been transacted in one Term?

WARD *for the plaintiff*. After plea the party can never be intitled to pray *oyer* of the writ. In *dower* you cannot do it after view. Indeed if they had demanded *oyer*, though they had no right to it, and we had granted it to them, they might perhaps take advantage of it (*a*).

MOUNTAGUE *contra*. One may have two sorts of pleas to abate the writ: FIRST, To the action of it: SECONDLY, That though it be well as to the action of it, yet it may be faulty in its frame, for want of legal form or agreeableness with THE REGISTER; and therefore, though we first plead to the action of the writ, and that be judged against us, * why cannot we have *oyer* of the writ, in order to plead to it for a fault in itself, or to demur to it? And after a plea in abatement the defendant may demur generally.

*[28]

Quod CURIA *concessit*; for the demurrer then is in chief.

And HE did agree the rule to be, that one should plead but one dilatory; but he insisted upon it much, that being in the same Term they might crave *oyer* of the writ specially in order to plead in bar or to demur.

And now HOLT, *Chief Justice*, *hæsitabat*, for these reasons:

FIRST, He agreed, that after *imparlance* one could not demand *oyer*; for *imparlance* is always unto another Term.

Lane, 39.
2. Lev. 142.

SECONDLY, He agreed, that after plea in *abatement* one could not have *oyer*, even in the same Term, to plead another dilatory. But what stuck with him was, whether this being in the same Term (*b*) they might not crave *oyer* in order to demur to the count, and shew a variance between it and the writ, or have it on record before the Court, in order to move it in arrest of judgment, or to take advantage of it upon *writ of error*, without being put to the charge of a *certiorari*? And he said, that after plea in *abatement* to a bond you may have *oyer*; and if you insist upon it, you must enter your prayer of it on record, and they shall counterplead or demur to your prayer; that if we give judgment against you, you may

2 Lev. 144.
Ld. Ray. 82. 347. 970.

(*a*) As to *oyer* of writs, see 7. Mod. 9. 3 Lev. 50. 5 Co. 74. Pott. 2. — NOTE to former edition.

(*b*) See Rex *v.* Amery, 1. Term Rep. 149.

have

have your *writ of error*; for though granting *oyer* where it ought not to be is no error, yet denying it it is.

LONGVILE *against* THE HUNDRED OF THISTLEWORTH.

DARNELL quoted the case of *London v. Bury*, where the plaintiff was forced to counterplead the *oyer*.

But at another day, PER TOTAM CURIAM, there shall be no *oyer* after a plea *in abatement*; for the true reason of *oyer* is, that the defendant may *demur*, and shew some cause, as a variance between it and THE REGISTER, &c.; and that amounts to a plea in *abatement*, or to plead some matter in abatement. See *Co. Ent.* 320. That after plea in *abatement* over-ruled (*a*) the defendant has no more to do with the original.

Vide 1. Salk. 7. and post. 225. Tidd's Pract. 223. 239.

And as to what occurred to THE CHIEF JUSTICE, that it might furnish matter in arrest of judgment, THE COURT all agreed now, that such motions are not acts of record, but are in nature of informations to the Court, as from *amici Curiæ*, to prevent erroneous judgments.

POWELL, *Justice*, in this case said, that formerly all demands of *oyer* were in court, as it is now in case of appeal; but that now it is demanded and granted between the attornies, and where there ought to be *oyer*, one is not bound to plead without it: and if one attorney in time demands *oyer* of the other, and he tells him the writ is filed, and that he may take it, it is well; but sure he cannot without such consent enter a demand, and a giving of *oyer*; for if attornies be admitted so to do, they will set forth the matter falsely: which though it could not ensnare the other side, because they may produce the right writ, &c. and have it entered, yet it would be very tedious and inconvenient: as if a deed be pleaded, it remains in court all that Term, yet one cannot go to the officer and take *oyer* of it without leave of Court, or of the attorney; and the very form of pleading shews that it must be upon demand; and *oyer* of a writ is in order to object to it; and after you have pleaded your dilatory without *oyer*, to what purpose should you have it now: it cannot [29]
be to plead it *in bar*; and to plead *a dilatory* it cannot be, because that would be to let you plead *a dilatory* after *a dilatory*; and to assign *a variance* between *the writ* and *the count* would be a *dilatory*.

So, PER TOTAM CURIAM, they were denied the *oyer*.

(*a*) That a plea to a bond for *misnomer* must be before *oyer*, for by *oyer* you admit the name, *Vide* Hob. 162.—NOTE to former edition.

Anonymous. Case 35.

PER CURIAM. It has been settled here on debate, that money ought not to be brought into court to have it struck out of the declaration, where an executor is plaintiff; but you may plead *a tender*, and *touts temps prist*.

Where an *executor* is plaintiff, money ought not to be brought into court, &c.

Ante, 11. 25, &c. 2 Salk. 583. 596, 597.

Case 36. Buller *against* Crips.

Before the passing of the statute 3. & 4. *Anne*, c. 9. a *promissory note* was not assignable or indorsable over within the custom of merchants.

S. C. 1. Salk. 130
Holt, 119.
2. Ld. Ray. 757.

A NOTE was in this form: "I PROMISE to pay *John Smith*, "or order, the sum of one hundred pounds, on account of "wine had from him." *John Smith* indorses this note to another; the indorsee brings an action against him that drew this *note*, and declares upon the *custom of merchants* as upon *a bill of exchange*.

A motion was made in arrest of judgment upon the authority of the case of *Martin v. Clarke*.

But BROTHERICK would distinguish this case from that; for there the party to whom the note was originally made brought the action, but here it is by the indorsee; and he that gave this note did, by the tenor thereof, make it assignable or negotiable by the words "or order," which amount to a promise or undertaking to pay it to any whom he should appoint, and the indorsement is an appointment to the plaintiff.

HOLT, *Chief Justice*. I remember when actions upon inland bills of exchange did first begin (*a*); and there they laid a particular custom between *London* and *Bristol*; and it was an action against the acceptor; the defendant's Counsel would put them to prove the custom; at which HALE, *Chief Justice*, who tried it, laughed, and said, they had a hopeful case of it. And in my LORD NORTH's time it was said, that the custom in that case was part of the common law of *England*: and these actions since became frequent, as the trade of the nation did increase; and all the difference between *foreign bills* and *inland bills* is (*b*), that *foreign bills* must be protested before a public notary before the drawer can be charged, but *inland bills* need no protest: and the notes in question are only an invention of THE GOLDSMITHS in *Lombard-Street*, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty: and besides, it would impower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these *notes* are not in the nature of *bills of exchange* (*c*); for the reason of the custom of *bills of exchange* is for the expedition of trade, and its safety; and likewise it hinders the exportation of money
[30] out of the realm. He said, if the indorsee * had brought this action against the indorsor it might peradventure lie (*d*); for the indorsement may be said to be tantamount to the drawing of a new bill for so much as the note is for upon the person that gave the note; or he may sue the first drawer in the name of the indorsor, and convert the money when recovered to his own use; for the indorsement

(*a*) See 5 Mod. 13.

(*b*) Post. 81.

(*c*) 1. Salk. 24. 129. 2. Salk. 442.

(*d*) What actions lie on bills of exchange, and how brought, and against whom—see Hard. 487. 1. Mod. 285. 1. Lev. 298. 2. Keb. 334. 695. 2. Vent. 307. 1. Keb. 592. 636. 1. Vent. 45. 152. 1. Salk. 24. 124. 133. 7. Mod. 45. 152.—Nota. *reform. action.*

amounts

amounts at leaſt to an agreement that the indorſee ſhould ſue for money in the name of the indorſor (*a*), and receive it to his own uſe; and beſides, it is a good authority to the original drawer to pay the money to the indorſee.

BULLER *againſt* CRIPS.

And POWELL, *Juſtice*, cited one caſe, where a plaintiff had judgment upon a declaration of this kind in the common pleas; and that my LORD TREBY was very earneſt for it, as a mighty conveniency for trade; but that when they had conſidered well the reaſons why it was doubted here, they began to doubt too.

THE WHOLE COURT ſeemed clear for ſtaying judgment.

At another day HOLT, *Chief Juſtice*, declared, that he had deſired to ſpeak with two of the moſt famous merchants in *London*, to be informed of the mighty ill conſequences that it was pretended would enſue by obſtructing this courſe; and that they had told him, it was very frequent with them to make ſuch *notes*, and that they looked upon them as *bills of exchange*, and that they had been uſed for a matter of thirty years, and that not only *notes*, but *bonds* for money, were transferred frequently, and indorſed as *bills of exchange*. Indeed, I agree *a bill of exchange* may be made between two perſons without a third; and if there be ſuch a neceſſity of dealing that way, why do not dealers uſe that way which is legal? and may be this: as, if *A.* has money to lodge in *B.*'s hands, and would have a negotiable *note* for it, it is only ſaying thus: "*Mr. B.* pay "me, or order, ſo much money value to yourſelf;" and ſigning this, and *B.* accepting it: or he may take the common note, and ſay thus; "For value to yourſelf pay me (or indorſee) ſo much;" and good.

And THE COURT at laſt took the Vacation to conſider of it (*b*).

(*a*) Bromwich *v.* Lade.—*Vide* Noy, 278. 3. Lev. 299. 3. Mod. 86.—NOTE *to former edition.*

(*b*) Now by 3. & 4. *Anne*, c. 9. "All "notes in writing made and ſigned by "any perſon or perſons, whereby ſuch "perſon or perſons ſhall promiſe to pay "to any other perſon, his, her, or their "order, or to bearer, any ſum of money "mentioned in ſuch note, ſhall be taken "and conſtrued to be, by virtue thereof, "due and payable to any ſuch perſon or "perſons to whom the ſame is made "payable; AND ALSO, every ſuch note "ſhall be aſſignable or indorſable over in "the ſame manner as inland bills of ex- "change, and the perſon or perſons to "whom ſuch ſum is by ſuch note made "payable, may maintain an action for the "ſame, in the ſame manner as they "might do on an inland bill of exchange "made or drawn according to the cuſtom "of merchants, againſt the perſon or "perſons who ſigned the ſame; and any "perſon or perſons to whom ſuch note "is indorſed or aſſigned, or the money "therein mentioned ordered to be paid "by indorſement thereon, may maintain "an action for ſuch ſum of money, "either againſt the perſon or perſons "who ſigned ſuch note, or againſt any of "the perſons who indorſed the ſame, in "like manner as in caſes of inland bills of "exchange." See Brown *v.* Harraden, 4. Term Rep. 148.

Case 37. **The Queen *against* Tracy.**

On an indictment for falsly arresting a man by a certain warrant, and thereby extorting divers sums of money, knowing the said warrant to be forged — *Quære*, Whether the forgery be matter of *description*, or of *aggravation* only.

TRACY, a justice of the peace for *Middlesex*, was indicted, for that he, together with *Taylor* and *Jeoffries*, by pretence of a certain warrant in writing, supposed to be signed and sealed by *Sir Simon Lovell*, recorder of *London*, did arrest *J. Muriel*, and brought him before *J. Chamberlain*, a justice of peace for *Middlesex*, although the warrant was not directed to any of them, and although it was forged and counterfeited to *Tracy*'s knowledge; and that *Tracy*, when *Muriel* was before the justice of peace, persuaded him to refuse to bail him, though the fault being a misdemeanor was in its nature bailable; and that when *J. Muriel* was committed by the justice, *Tracy* and the other two, at the persuasions and instance of *Tracy*, extorted divers sums of money from him.

S. C. post. 114. 169. 178. S. C. 3. Salk. 192. S. C. Holt, 706. Post 90. 7. Mod. 99.

The jury acquitted the defendant of *the forgery*, and of knowing that the warrant was forged, and found him guilty of all the rest.

WELLD and PARKER now moved in arrest of judgment,

* [31]

* FIRST, That the verdict was contradictory, for it acquitted him of that which was the foundation of all that whereof he is found guilty; for the charge is, that he did so and so by virtue of a certain forged warrant; and if the warrant be not forged, the rest either is no crime, or rather it is another offence than what the defendant is charged with; for to get one taken up upon a real warrant not directed to him, and to do whatever is charged here thereupon is another offence than is described here: therefore defendant is *acquitted* of the offence wherewith he is charged, and *found guilty* of another.

And upon the first objection, a case of an indictment against THE PLAYERS of *Drury-Lane* was cited; where the indictment was for building a scandalous house for the acting of profane and lewd plays, and that they acted such plays; and though they could prove the acting of immoral plays, yet, because they could not prove the building, the defendants were acquitted.

1. Vent. 12. 234. 362. Ray. 118. 176. Hob. 205. 266. 2. Keb. 473. 476.

TO THIS *it was answered*, that though the indictment did not alledge the warrant to have been forged, but only under a *licet* by way of aggravation, and not by way of description, and though the warrant be not forged, yet the facts charged upon the defendants are criminal; as to persuade one by wicked and false insinuations to refuse bail, to have cruelly used him in gaol, and by duress to extort money of him.

An indictment for procuring a justice to refuse bail must state, that bail was offered and refused.

SECONDLY, That it was laid, that he prevailed with the justice of peace to refuse bail, and it was not laid that any bail was offered.

TO THIS OBJECTION *it was answered*, that it was not said that bail was offered; it was said, every refusal must be of an offer; and refusal could not possibly be without an offer.

THIRDLY,

THIRDLY, It is not directly said, that the justice did commit him, but only, that when he did commit him, *Tracy* did so and so to him; and it may be he never was committed, for aught that appears here. — An indictment for procuring a person to be falsely committed must state that he was actually committed.

TO THIS OBJECTION *it was answered*, that the commitment was not charged as a crime, but only as an inducement to the extortion, which is directly charged; and what comes under an inducement need not that preciseness.

FOURTHLY, They ought to shew the certainty of the sums taken, and for what they were taken, otherwise the defendant may not know what answer to make. — An indictment for *extortion* must state *the sums* taken.

FIFTHLY, As to some part of the charge, they charge him as accessary, when, it being trespass, they all are principals, and ought to be charged as such. — An indictment for *trespass* is good, although some of the facts charge the prisoner as an accessary.

HOLT, *Chief Justice*.

As to THE FIRST OBJECTION the question is, Whether the *forgery* be the ground-work, or whether it be an unnecessary addition put in only for aggravation? for if it be matter of description, the objection is of weight.

* As to THE SECOND OBJECTION, that no bail were offered; it is true, a justice of peace is not bound to ask for bail if they be not offered to him, and therefore the objection seems of weight. And something has been offered that a verdict would influence the case; but it does not, for in criminal matters the jury is only charged to enquire of matters as they are alledged. [32]

As to THE THIRD OBJECTION, that he could not procure if it were not actually done: that is true, but that [illegible] but argumentative; and indictments ought to be positive and direct. — 1. Vent. 19. 4 Co. 41. 48. 9. Co. 66. Noy, 41. 32. Plow. 85, 86. 1. Ro. Ab. 79.

As to THE FOURTH OBJECTION to the execution, the crime does not consist in the *quantum* of the money extorted, but in taking any at all.

As to THE FIFTH OBJECTION, that he is not in some things charged as principal. It is to be known, that a fact which would make one *accessary* in *felony*, in *treason*, and in *trespass*, makes him *a principal*; and sure one may lay the matter either way, viz. making him principal or laying it special, as it will appear upon evidence. In treason all are principals; and if upon the statute of 25. *Edw.* 3. c. 2. one conspires the death of the queen, and is committed to prison for the same, and one procures him to escape, or harbours him after such time as he knows him charged with treason, or to have committed treason, you may indict him upon the special matter, that *A.* committed treason, that *B.* knew of it and received him; and yet this is not one of the treasons mentioned by that statute, but it is so by necessary consequence of law. And if a thing be made felony, all accessaries before and after are felons ... [illegible] — 3. Wms. 475. 439. 485.

 [illegible]

quence; and if an offence which is felony be made treason, they that would have been acceſſaries before ſhall now be principals.

POWELL, *Juſtice*. Sure the fact might be laid ſpecially in *treſpaſs*; for indictments need not be like other pleadings, according to the conſtruction of law upon the matter; and ſo it may be in caſe of *treaſon*; it was the caſe of *Abingdon v. Gardner* in the GUNPOWDER PLOT. In ancient indictments of murder upon malice in law, the malice in law uſed to be ſpecially laid; but ſince it has been agreed, that it may be generally *ex malitiâ*: and I think, in the principal caſe, it is more prudent and ſafe to draw the indictment upon the ſpecial matter; for otherwiſe it might be difficult to perſuade *the lay gents*, that procuring, inciting, commanding, &c. would make one a principal.—As to the firſt two exceptions, he agreed with THE CHIEF JUSTICE; but he doubted whether, if an indictment charge one to have procured a crime to be done, it need be directly alledged that it was done: as if the indictment be for maliciouſly procuring one to be indicted of felony, whether it need be directly averred that he was indicted, becauſe the word "*procuravit*" neceſſarily ſeems to import it, and not only that he procured *ad faciend.* as you would have it, that is, to conſent and agree to do it. As to the uncertainty of the ſums extorted, an indictment for engroſſing *magnam quantitatem frumenti* was held good. And where you inſiſt, that the warrant being true and real the arreſt was lawful, and that *falſò et malitioſè* are only pepper and vinegar, which will not determine any act to an ill ſenſe; * ſure it is hard to maintain that *falſò et malitioſè* are only pepper and vinegar, for thoſe words diſcover the evil root from which the fact ſprung.

Carthew, 113. 216. 4 382. 403, 404.

* [33]

1. Vent. 12. 15. 23. 25.

HOLT, *Chief Juſtice*, ſaid, that *ex malitiâ præcogitatâ* in an indictment for killing a man was ſuch ſauce as would cut his throat; and though it be admitted that the warrant being true the arreſt was lawful, yet that the arreſting a man upon a true warrant, and procuring the refuſal of bail when tendered, as the fact appeared, and following the party into gaol, and extorting money from him there by dureſs and threats of iron, was ſuch a complicated offence as deſerved an indictment, and that the ſubſequent *tort* made the original act illegal, as being an abuſe of legal proceſs.

4. Com. Dig. "Indictment" (G 3.). Ante, 32.

And at another day, HOLT, *Chief Juſtice*, declared, that they were all of opinion, that they could not give judgment upon the indictment; that it was too uncertain, and one complicated offence; that it did not appear by it that any bail had been offered, or what ſum, or that any certain ſum was extorted.

But they only gave judgment to *quaſh the indictment*, and not *for the defendant*, whom they ordered to enter into a new recognizance to appear to a new indictment.

Wiat,

Wiat, *Qui Tam*, *against* Ayland. Case 38.

IT was a declaration of *Michaelmas Term* generally, which *primâ facie* is to be intended to be of the first day of the Term, and the fact was laid to be on the fifteenth of *November* after, so the action brought, of their own shewing, before cause.

In what case a mistake in the MEMORANDUM may be *amended*.

PER CURIAM. If upon examination it appear, that the declaration was after the fifteenth, it shall be set right; as if the bail was filed after the fifteenth, or the *bill of Middlesex* taken out.

And so it was referred to THE MASTER to examine.

THEY ALL AGREED it could not be amended by any *statute of Jeofail*; but if bail were filed after the fifteenth of *November*, that would be a good warrant for A MEMORANDUM of the day that the declaration was of, for none is *in custodiâ mareschalli* till bail filed.

S. C. 1. Salk. 324. S. C. Holt, 209. Post. 129. 2. Salk. 682. 2. Saund. 689. 1. Vent. 135. 2. Lev. 13. 176. Hob. 73. Ld. Ray. 897. Fitzg. 193. Stra. 806. 1023. 1271.

NOTE, At last the parties agreed to waive execution, and go to trial again.

The Queen *against* Bothell. Case 39.

FIRST, If one bring a *certiorari* to remove an indictment, and do not give bail to try it according to the statute, it is no *supersedeas*.

A *certiorari* is no *supersedeas*, if there be no recognizance.

S. C. 1. Salk. 149 S. C. Sett. & Rem. 220. S. C. Holt, 157. Post. 43. 1. Salk. 144. Skin. 419. Ld. Ray. 722. 12 Mod. 646.

SECONDLY, A record once filed in this court is never sent back: though BROTHERICK at the bar said, it might be sent back the same Term.

A record once filed cannot be remanded after the Term. Post. 40. 43. 61. 83.

Squire *against* Grevell. Case 40.

ERROR of a judgment in the court of common pleas in debt upon a bond for performance of an award. After *no award* pleaded, the plaintiff set forth *an award* on such a day, reciting several suits depending between the parties in the common pleas, and a submission of all matters pending.—The arbitrators award, FIRST, That all suits between the parties shall cease. SECONDLY, That the defendant shall pay to the * plaintiff ten pounds in full of all demands, and also give him a release from the beginning of the world to the time of the award made. THIRDLY, That upon receipt of the ten pounds the plaintiff should make a release to the defendant from the beginning of the world to the time of the award.

An award that "all suits shall cease," is [illegible]

S. C. Holt, 81. S. C. 2. Ld. Ray. 961. S. C. 1. Salk. 74. Post. 232. Ibid, 142. 2 Stra. 1024. 1 Com. Dig. "Arbitrament" (E. 17.).

PARKER took three exceptions to this award:

FIRST, It is not *final*, for it is only that "all suits now depending shall cease," that is to say, shall not go on, which is no more than

SQUIRE *against* GREVELL.

than that the party ſhall be nonſuited, which is not final, and therefore not good. It is true, no new ſuit can be brought while theſe pend, becauſe theſe may be pleaded in abatement; nor can theſe be proſecuted becauſe of the award; but if either of the parties die, new ſuits may be proſecuted for the ſaid cauſes, notwithſtanding this award.

An award that one of the parties ſhall pay 10l. and that the other, on receipt thereof, ſhall make *a releaſe*, is good.

SECONDLY, The awarding a *general releaſe* would indeed make it a good award, if it were concluſive, but it is left in the plaintiff's election whether he makes any or not; for the releaſe is ordered to be made upon receipt of the ten pounds, and it is not awarded that he ſhall receive it, and if he refuſe he is not bound to releaſe.

1. Roll. Abr. 255. Kyd, 156. 1. Com. Dig. "Arbitrament" (E. 14.).

An award of *a releaſe* to the time of the award made is good.

2. Keb. 431. 3. Keb. 253. 666. 10. Mod. 201. 2. Ld Ray 964. 1. Ld. Ray. 116. 12. Mod. 116. 589. Kyd on Aw. 165. 181.

THIRDLY, The releaſe is ordered to be until the time of the award. But he confeſſed he did not much inſiſt upon that. The authorities were againſt him for a double reaſon: FIRST, That no cauſe of action ſhall be intended to have ariſen between the time of the ſubmiſſion and the award, if it be not ſhewn. SECONDLY, That a releaſe to the time of the ſubmiſſion is a good releaſe in purſuance of the award, and the latter he ſaid he took to be the better reaſon; for a man might have a cauſe of action accrue to him between the ſubmiſſion and the award and not know of it; and it would be hard to put him under a neceſſity of releaſing it; and the reaſon why a releaſe to time of ſubmiſſion is held good is, not becauſe it ſhall be intended to be the meaning of the arbitrators that it ſhould be ſo, but it is rather a controlling of their meaning as far as it is void by conſtruction of law.

PENGELLY *contra*. The awarding that "all ſuits ſhall ceaſe" is, that they ſhall for ever ceaſe, and it extinguiſhes the duty; for if the words had been that "all actions ſhall ceaſe," the duty had been gone; for if the remedy be gone the right is gone; and the word "ſuit" is of a larger extent and ſenſe than "action;" for by "releaſe of ſuits" one may bar himſelf of execution, which he cannot do by "releaſe of action (*a*). Such award extinguiſhes the duty (*b*). An award was, that one of the parties ſhould pay to the other ſo much money on ſuch a day, and that all ſuits ſhould ceaſe till failure of payment, and it was held good (*c*). Beſides, this ſum being awarded "in full of all demands," and the ſubmiſſion being with an "*ita quod* an award be made of the premiſes," it is in itſelf final (*d*).

[35]

* HOLT, *Chief Juſtice*. As to the releaſe you ſay, that it is put upon the party's own act, in receiving or refuſing the money, to releaſe or not; but it has been held, in the caſe of *London v.*

(*a*) 1. Roll. Abr. 251. pl. 7.

(*b*) See the caſe of Strangford *v.* Green, Eaſter Term, 29. *Car.* 2. and Ball *v.* Heſcott, 11. *Will.* 3.

(*c*) 1. Lev. 58.

(*d*) Allen, 26. 85. 1. Roll. Abr. 260. pl. 55. 258. 1. Sid. 154. 1. Lev. 132. Hob. 190. Stiles, 27. Cro. Eliz. 448. 851.

Craven,

Craven, in the latter end of *Style* (*a*), that where a thing is agreed to be done upon payment and receipt, a tender of the payment and refusal intitles the party to it as much as an actual payment; and the authorities have been so ever since. *Quære* 9. *Co.* 79, *Dyer*, 356. 1. *Lut.* 224. 227. 238. *Lev. Ent.* 30. 2. *Sand.* 96. Squire against Grevell.

Then as to THE NEXT POINT, "That all suits pending between "the parties shall cease:" The question is, Whether this goes to the cause of action? If a man release his action, and has no other remedy for his right but an action, Does not that discharge the right of the thing? Now here is an action depending; if a man release that action, he thereby releases the right of action; and by the same reason determining the suit determines the right of the thing, because there is no remedy but by suit; then this award is final. If in trespass the plaintiff after the last continuance release the action, the right is gone; and if a release will do it, why not an award? Indeed if the party had two remedies, one by action and another by entry, and he released the action, he might notwithstanding enter. Co. Lit. 289. 2. Ro. Abr. 404. 1. Danv. 1. Cro. El. 14. 161.

And as for the release to the time of the award made, it shall not be understood that there was any cause of action meant, if it be not shewn; and if there be, the party may shew it, and say that he tendered a release to the time of the submission.

POWELL, *Justice*. I think all the three points are final, or if but one of them is so, the award will be good for so much, if that does not depend upon another branch of the award which is ill; and if there were any suits pending, the awarding that they shall cease is, that they shall be at an end for ever; and the words "*now de-* "*pending*" was only to shew what sort of actions they made their award of. And the ten pounds being awarded to be paid "in full "of all demands," that shall be intended in full of all demands to the time of submission, and not to the time of payment (*b*). And if money be awarded to be paid, and that the other upon receipt shall make release, that I take to be an award to receive; and for this he quoted a case in the common pleas in his time, and 1. *Rol. Ab.* 254, 255. *pl.* 16. 2. Cro. 354. 1. Salk. 74. 71. Style, 44. Hob. 49. 8. Co. 97.

HOLT, *Chief Justice*.—Here the very awarding a sum of money is a bar of actions; for by the awarding of money to him a duty thereby arises and vests in him, which is a good bar wherever "accord with satisfaction" is a good plea; but anciently it was held, that if the thing awarded be not money, but the doing of some collateral act, the party to whom it is awarded is without remedy, and therefore such award would be void. But the contrary has been held since; for if two men submit to the award of a third person, they two do also thereby promise expressly to abide by his determination (*c*), for agreeing to refer is a promise in itself; but

(*a*) Stiles, 388. 451.
(*b*) See Kyd on Awards, 158.
(*c*) Kyd on Awards

here

Squire *against* Greville.

here a sum of money is ordered to be paid; it is immediately a duty; and if there were no more than an award to pay a sum of * money in satisfaction of all demands, it would be final.

And, by THE WHOLE COURT, the judgment was affirmed.

Case 42.

Ward *against* Evans.

If the *holder* of a bill of exchange for *sixty pounds* send his servant with it to the *payee* for payment, and the *payee* give the servant *a draft* on his *banker* for a *hundred pounds*, and the *banker* writes off the *sixty pounds* from the *hundred pounds* draft, but the *servant*, instead of receiving *the money*, takes a note of *sixty pounds* from the *banker* on a *merchant*, who immediately after becomes insolvent, and refuses to pay the note, the act of the *servant* shall not, in such case, bind his *master*; for the servant was sent to receive *the money* from *the payee*, and not [illegible], and therefore the *master* may recover the *sixty pounds* from the *banker* in an action of *assumpsit*, as money had and received from the *payee* of the bill to his use.

A CASE made before HOLT, *Chief Justice*, at *Guildhall*, was this:

One *Fellowes* owed the plaintiff *sixty pounds* by bill of exchange. *Sir Stephen Evans* the defendant owed *Fellowes* a *hundred pounds* also by bill. The plaintiff sends his man to *Fellowes* with the bill for payment. *Fellowes* sends his man with the plaintiff's man to *Sir Stephen Evans* with the note of a *hundred pounds* to pay the plaintiff his bill. *Sir Stephen Evans* writes off *sixty pounds* of the *hundred pound* note, and indorses it upon the back, and gives the plaintiff's servant a bill of *sixty pounds and ten shillings* upon another person for his *sixty pounds*, taking *ten shillings* from the plaintiff's servant, who the very next day carries the bill for payment to the party, who had just failed immediately before.

The question was, Whether this were a good payment by *Evans* to the plaintiff?

DARNELL, *Serjeant*. There are three things to be considered here.

FIRST, How far the transaction of a servant as to receipts and payments shall bind his master?

SECONDLY, What amounts to a payment? Whether such a note as was given here is good payment to the master himself?

THIRDLY, Whether, though this transaction of the servant should not bind the master generally, it will be binding between goldsmiths, as this case is?

As to THE FIRST he said, that upon this head of a servant binding his master by his act, there might be a reasonable difference between the servants of merchants and those of other men; for probably servants may affect their masters being merchants, &c. in point of charge and discharge; but that first must be in matters purely concerning their trade and way of dealing, as to answer bills of exchange, and letters of advice concerning goods, or such like, which require dispatch; but he cannot accept a bill of exchange, without plain evidence that he has authority to do it. So is *Lex Mercat.* 265. which is an excellent book concerning these matters. And it is good evidence in that case, that the master allowed

S. C. 2 Ld Ray 928. S. C. Com. 138. S. C. 2. Salk. 442. S. C. 3. Salk 118. S. C. 12. Mod. 521. S. C. Holt, 120. Winch. 24, 25. 3. Mod. 86. 3. Lev. 299. Moll. l. 2. c. 10. s. 19. 27. 29. 5. Mod. 398. 3. Bac. Abr. 562. 1. Stra. 415. 3. Burr. 1516. 1, Bl. Rep. 485. 2. Wils. 353.

allowed the payment or protesting of bills drawn by him, or gave him such authority; for it is hard to put it in the power of a servant to ruin his master without his order or knowledge. It was never heard, that if a merchant send his servant to receive *money*, that he may receive *a bill* for it; and without doubt it would be void if done by any other servant of a private person, because beyond his authority, which ought to be pursued strictly. WARD *against* EVANS.

SECONDLY, Whether such a bill be payment at all? The law takes no notice of any payment to discharge a debt but ready money, or something else given and taken in satisfaction (*a*). A less sum is no payment for a greater, if not before it is due, or at another place than it is payable at. *Mar. fo.* 25. Ld. Ray. 442. Stra. 480. 505. 653. 955. 1248.

* THIRDLY, It being the case of goldsmiths does not alter the case, for the delivery of these notes, as is now used, is no part of their trade; a very new invention, already obnoxious to such practices as deserve no encouragement. * [37] 2. Salk. 442.

He agreed, that in some cases such notes may be given for absolute payment; as if one come to buy goods of another, and, having agreed on a price, the buyer, upon delivery of goods, give the seller a *goldsmith's note* in satisfaction, this shall be looked upon as payment *primâ facie*, because, being all at one time, it shall lie upon the seller to prove that it was a conditional payment, and so expressed at that time; but here it lies upon the giver to prove that he gave it in satisfaction. The party's not going immediately to call for it is evidence that it was taken in satisfaction; but he went the next morning.

HOLT, *Chief Justice*. It is plain, that the servant was sent by his master to receive *the money*, and not *the bill*. Next, it is also plain, that if the servant, upon tender of the bill, had come back to the master to know his mind, and the master had sent him back for the money, and notwithstanding he had taken the bill, that would not have charged the master (*b*); but here was some time for the master to assent to what his servant had done; but giving such a bill as this upon an original contract, is evidence that it was given and received for payment: AND HE HELD CLEARLY, that the indorsement by *Evans* on the note of *Fellowes* was a receipt by him of so much money to the use of plaintiff, for which an *indebitatus assumpsit* would lie; and in this point they all clearly agreed without doubt. Hob. 154. Roll. l. 2. c. 10. f. 17. 1. Salk. 132, 133.

And, at last, THEY ALL AGREED, That if a master send his servant to receive money upon a *goldsmith's bill*, or any other, and he take another bill upon another person for payment, that shall not bind the master without some subsequent act of consent, as if he do not send the bill back in reasonable time, with regard to circumstances, &c.

(*a*) See 3. & 4. *Anne*, c. 9. s. 7. v. Smith, Easter Term, 5. *Anne*, in
(*b*) See the case of Sir Charles Thorold B. R. 10. Mod. 71. 87. Holt, 462.

And

WARD against EVANS.

And HOLT, *Chief Justice*, desired the Counsel, if they were not satisfied with the opinion of the Court, to have their *bill of exception*, and that he would sign and seal it, that they might have a writ of error, which they declined (*a*).

(*a*) And by THE WHOLE COURT, judgment was given for the plaintiff. S. C. 2. Ld. Ray. 931. S. C. 1. Comyn Rep. 138.

Case 42. Anonymous.

If one of two coroners be insolvent, and suffer an escape, yet the other shall not be charged.

3. Lev. 399. 2. Mod. 23, 24. Show. 400.

PER HOLT, *Chief Justice*. If there be two coroners, one whereof being a beggar suffer an escape, it is very hard to charge the other with it. The case came before me once, and I would not take upon myself to determine it, though my brother LEVINZ reports that I would have over-ruled him in the exception (*a*). And that case has been argued several times in the common pleas, but not adjudged: But THE COURT thought it hard to charge the other. See the case of *Butcher v. Porter* (*b*), in the time of the late king.

(*a*) Taylor v. Clerke, 3. Lev. 399. (*b*) Carth. 243. 1. Show. 400. 2. Ld. Ray. 1017.

*[38]

Case 43. * Godolphin and his Wife *against* Tudor.

Leave to plead *to issue* after *demurrer* joined.

S. C. post. 234. S.C. 2. Salk. 468. S.C. 3. Salk. 251. 2. Sal. 515. Post. 84. 88. 118. Ld. Ray. 669. 679. 856. 1. Barnes, 110. 212. 2. Barnes, 134. 5. Com. Dig. "Pleader" (C. 6.).

A DEMURRER was joined in *Easter Term* last, and all continuing *in paper*.

They moved now to change their plea, and plead a matter issuable.

PER CURIAM. It is very regular while it is in paper to change or amend upon payment of costs.

And motion was granted upon payment of costs.

Case 44. Lord Harry Scot *against* Brace, Redmond, and Others.

Bail in error upon bond with a penalty. 5. Com. Dig. "Pleader" 709, 710.

A BOND was for the safe return of such a ship (suppose under a hundred pounds penalty) and judgment thereupon in the common pleas, and writ of error here.

The question was, Whether there should be bail within the statute?

And PER CURIAM, Let there be bail *nisi* (*a*).

(*a*) See Putt v. Coney, Stra. 476.

Case 45. Monkton *against* Ashly and Others.

Trespass for breaking his close, and hunting and killing his rabbits, may be laid with a *continuando*. — S. C. 2. Salk. 638. S. C. Holt, 697. S. C. 2. Ld. Ray. 974. 2. Roll. Abr. 549. Skinner, 42. 641. Carthew, 230. 2. Mod. 253. 5. Mod. 178. 1. Lev. 210. 3. Lev. 93. 2. Ld. Ray. 936. Cowp. 828. 5. Com. Dig. "Pleader" (3. M. 10.).

TRESPASS for breaking plaintiff's close, treading his grass, hunting and killing his rabbits, with a *continuando* of the said trespass, as to all the particulars *diversis diebus et vicibus*, from

from ſuch a time to ſuch a time. After verdict and entire damages, MONKTON *againſt* ASHLY AND OTHERS.

SALKELD moved in arreſt of judgment, That of their own ſhewing they had recovered damages for that for which they ought not to have recovered; for every entry, hunting, and killing, is a new treſpaſs (*a*). A defendant came every day upon the plaintiff's ground to claim it as his own; and it was held that he could not be declared againſt with a *continuando* (*b*). Nothing properly can be laid in *continuance* but acts of duration in themſelves, as nuiſance, ſtopping of lights, water, feeding of cattle; for theſe are permanent things, and have duration without intermiſſion, and therefore may be laid with *a continuando*. And other things can by no means be continued, as killing a man's horſe, cutting a tree; for there the treſpaſs terminates with the very act, and cannot be repeated. So the queſtion will be then of acts that may be repeated, and in what caſes they may be alledged with *a continuando?* If the firſt entry is ſuppoſed to be without an *ouſter*, the ſecond entry will be ſuch a new treſpaſs as cannot be called *a continuando* of the firſt; and a releaſe of the firſt will not diſcharge it; but if the firſt act amount to an *ouſter*, all ſubſequent acts are continuances of it (*c*); and he ſaid, without this diſtinction, the books were not reconcileable. In *Fitzherbert* (*d*), treſpaſs for breaking his cloſe, and cutting his graſs with *a continuando*, muſt be underſtood of an actual *ouſter*, 20. *Hen.* 7. *pl.* 3. and *Butler v. Hedges* (*e*), which he ſaid was a wonderful ſtrong caſe, and contrary to the caſe of *Brook v. Biſhop* (*f*).

* MONTAGUE, *for the plaintiff.* As to the objection, either it is poſſible or it is not; if poſſible, damages may well be for it; if impoſſible, the Court will intend the damages to have been given altogether for that which is poſſible, and not for that which is impoſſible. * [39]

SALKELD, *for the defendant.* The damages muſt be intended to have been given for whatever we are expreſsly charged with, and all the particulars of the treſpaſs are ſpecially and expreſsly laid in *a continuando:* Indeed, if he had declared with *a continuando* of the treſpaſs *aforeſaid* generally, the Court would apply the *prædictus* to that which might be continued; but they cannot do it againſt the expreſs allegation of the party; and an *ouſter* cannot be intended in this caſe.

HOLT, *Chief Juſtice.* I cannot ſee but that a man may lay entering into his cloſe, and hunting in his warren, with *a continuando* of the ſame, for ſeveral days: it is not indeed one continued act, that laſts from one day to another; but it is, that the defendant has 2. Salk. 638, 639.

(*a*) Year-Book 2. *Rich.* 3. pl.
(*b*) Year-Book 21. *Hen.* 6. pl. 43. abridged by Fitzherbert, "Treſpaſs," pl. 51.
(*c*) See Yelv. 126. 1. Brownl. 223.
(*d*) Fitz N. B. 91.
(*e*) 1. Lev 210. S. C. 1. Sid. 319.
(*f*) Eaſter Term, 2 Queen Anne.

been

MONKTON *against* ASHLY AND OTHERS.

been hunting there daily, &c. and that is *prædict. transgressionem* continued; and I cannot agree to the case in *Yelverton*, but it was in favour of the judgment. But to say, that if trespass be laid with *a continuando*, answering the original trespass is of consequence an answer to the *continuando*, seems strange; for the *continuando* is a trespass continued, which ought not to be unanswered. If I say, that on such a day *J. S.* entered into my wood, and cut so many load of wood, and carried them away, *continuando quoad* the cutting, it is senseless, and so is the case of *Butler v. Hedges*, which you deny as to the throwing of the logs; and when such trespasses that lie not *in continuando* are laid with *a continuando*, the Judge ought not to suffer any thing to be given in evidence but the first act.

1. Lev. 210. 1. Sid. 319.

POWELL, *Justice*. Why may not the hunting lie in continuance, as well as the feeding of cattle? for as a man cannot hunt night and day incessantly, so cannot a beast feed; nor is the feeding yesterday the same identical continued feeding in your sense of unintermission: yet trespass *quoad depasturacon'* is frequently laid with *a continuando*; but cutting a tree cannot, or killing so many rabbits such a day *continuando*, or entered and took away so many loads of corn such a day, you cannot say *continuando*; but the way is to say, that such a day the defendant entered, and did so and so; and *diversis diebus et vicibus*, between such a day and such a day he did, &c. and in these cases there ought to be no evidence but of single instance, and the jury can give no damage but as far as their evidence: and so are the cases in the Year-Book of *Henry the Seventh* and *Richard the Third*, which you quoted.

Co. Lit. 257.

HOLT, *Chief Justice*, took this difference as to the *ouster*: If you lay an *ouster* in your declaration, you must lay a *re-entry*, or else you cannot recover the *mesne profits*; but if you enter, you may lay it with *a continuando*, if it will bear one, and recover damages for the entry and mesne profits.

* [40]

And at another day, THE WHOLE COURT * held it well, and said, that a trespass for prostrating a bench with *a continuando* was held good; so *conculcavit et assumpsit* lies in continuance. Cutting certain quantity of wood lies not in continuance: But to lay that well, see the *Year Book* 31. *Hen.* 6. But this here is relative to no quantity, but a continuance of a small kind of trespass. If it had been, that he killed three rabbits that day *continuando*, it had been bad: so if for cutting five hundred loads of corn such a day; and they in that case can give no more in evidence than what was on that day.

Carthew, 144. 230. Skinner, 42. 641.

JUDGMENT was given for the plaintiff.

The

The Queen *against* George. Case 46.

A CONVICTION upon the statute of 4. and 5. *Will. & Mary*, c. 11. was, that the party, "*existens dissoluta persona*," did hunt and kill so many hares. — A conviction for killing game must state the negative qualification.

And it was quashed; because it was not said, that he was not qualified; for there are many dissolute persons worth two thousand pounds a-year, and who are, by consequence, qualified to hunt, &c. (*a*). — S. C. post. 57.

(*a*) See Rex *v.* Chip, 1. Stra. 711.; the Queen *v.* Mathews, 10. Mod. 27.; Rex *v.* Marriott, 1. Stra. 66. Rex *v.* Hill, 2. Ld. Raym. 1415. Rex *v.* Jarvis, 1. Burr. 148.; Bluet *qui tam v.* Needs, Comy. Rep. 525.; Rex *v.* Wheateman, Dougl. 331.; Rex *v.* Hall, 1. Term Rep. 320.

Anonymous. Case 47.

A SPECIAL justification must be of matter of *fact*, and not of *record*; for matter of record must be pleaded even by an officer. — Special justification.

Anonymous. Case 48.

HOLT, *Chief Justice*. A writ of inquiry cannot be quashed, until it be returned and filed; but before the return it may be superseded, *quia improvidè emanavit*. — Quashing writ of inquiry. Post. 43.

Anonymous. Case 49.

HOLT, *Chief Justice*. If an order on which appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the Court is informed of the matter; and then they will grant *a procedendo*, notwithstanding *the certiorari*. — Order removed by *certiorari*, on which appeal lies. Ante, 13. Post. [illegible] 83. 12. Mod. 646.

Shepherd and Baily *against* Orchard. Case 50.

SHEPHERD and *Baily* brought a writ of error, and made two attornies upon the *scire facias*: the one attorney assigned error; to which the defendant *took issue*; and then the other would plead *in abatement* of the writ. — If, on error by two, there be two attornies, and one only assign error on which there is issue, there can be no [illegible]. 10 Co. 131. 1. Lev. [illegible] 1 Salk. [illegible] 83. 5 [illegible] Abr. 666. S[illegible] 783.

PER CURIAM. If one of the plaintiffs had made default, he should be severed; but if they go on, they must proceed jointly; and if one attorney will assign error, &c. without authority from both, we cannot help him.

Let him take his remedy against the attorney.

Anonymous. Case 51.

NOTE, If a record of this Court be pleaded, "*nul tiel record*," without more, is a compleat issue. — Nul tiel record.

Case 52.

* The Queen *against* Dyer.

A *conviction* on a penal statute must shew that the defendant was *summoned*; and therefore if a conviction state that "the "defendant was "summoned, "and did by "virtue there-"of appear on "*Tuesday* the "17th *April*," and it appears by THE ALMANACK, of which the Court is bound to take notice, that the 17th of *April* was on a *Friday*, the conviction shall be quashed; for the time of the summons being *impossible*, it is the same as if there had been no summons.

S.C. 1. Salk. 181. S. C. Holt, 157. Post. 96. 2. Ld. Ray. 1405. 1546. 2. Stra. 630. 10. Mod. 213. 1. Stra. 46. 2. Burr. 679. 1. Term Rep. 316.

THE defendant was convicted upon the statute of 7. *Jac.* 1. c. 7. for embezzling yarn delivered to him to be woven.

The conviction begun: "WHEREAS complaint hath been "made before us, *A. B. &c.* justices of the peace in *C.* by *J. S.* "that on such a day;" and sets forth the charge: it further sets forth *a summons* made by them to bring him in; and that by virtue thereof he appeared before them on *Tuesday* the seventeenth of *April*, in the year 1702.

THE OBJECTION made was, that *a summons* is essential in the case; and that here it appeared on the face of the conviction, that there was no summons, for the summons shewn is impossible, there being no such day as *Tuesday* the seventeenth of *April* in that year; for the seventeenth of *April* in that year was on a *Friday*.

TO THIS IT WAS OFFERED *for answer*, that the order had been good without setting that matter forth; for things incidental to a jurisdiction need not be set forth, but things accidental must (*a*). A return was made to a *habeas corpus*, directed to *the chancellor of Oxford*, that he was a justice of peace, &c. and that the party was convicted before him for extortion, without setting forth the manner. It may be objected, that though perhaps it needed not to have been set out, yet if you go about it, you must do it well at your peril. But what is said, is only under "*a* "*whereas*," and by way of *recital*; and the words do not say, that he did not appear; but say, that he appeared at a day impossible; which does not exclude an appearance at a day possible: and according to the rule in *Alton Wood's Case* (*b*), and *Plowden* (*c*), that which need not be shewn, if shewn ill, shall not vitiate (*d*).

HOLT, *Chief Justice*. Of common right the party ought to be summoned, if possible; and it would be well to set forth, that he was summoned and appeared (*e*), or did not appear, or could not be found to be summoned; and though the act of parliament orders that the offender shall be convicted, yet that must be intended after *summons*, that he may have an opportunity of making his defence; and this summary jurisdiction ought to be held strictly to form, and every thing ought to appear regular in them; and they ought to make A MEMORANDUM, that on such a day complaint was made; that thereupon a summons issued returnable on such a day; and that the party being summoned did or would not appear, or could not be summoned, &c. It is abominable to convict a man behind his back.

(*a*) See the Year-Book 9. *Hen.* 6. pl. 44. and the case of Creswick *v.* Rokesby and Others, 2. Bulst. 48.

(*b*) 1. Co. 40. Jenk. 251.

(*c*) Plowd. 32.

(*d*) See Year-Book 12. *Hen.* 7. pl. 12. 2. Jones, 50. Raym. 102. Dyer, 95.

(*e*) That the defect of the *summons* is cured by the *appearance* of the defendant, see Reg. *v.* Barrett, Salk. 383. Rex *v.* Johnston, 1. Stra. 261. Rex *v.* Aikin, 3. Burr. 1785.

And

And ALL THE COURT AGREED, that of common right there ought to be *a summons*; and that THE ALMANACK is part of the LAW OF ENGLAND, of which the Court must take judicial notice *(a)*; and that nothing could make this good but an intendment, that the justice would not convict one without a summons. The QUEEN against DYER.

* POWELL, *Justice*, said, that if an action were brought against an officer upon execution of this conviction, it would not lie, for an erroneous conviction would justify him *(b)*. Indeed, if you had shewed no summons, perhaps the Court would intend one, according to precedents; but here you shew a summons, and an appearance at a day impossible: and he said that my LORD HALE used to say, there ought to be a summons. * [42]

And for the said objection, the conviction was quashed PER TOTAM CURIAM, the last day of *Hilary Term* after.

(*a*) Post. 81. 160. 252. 1. Lev. 242. 95. Hard. 484. Strange, 1002. 1. Wils.
(*b*) See on this subject, 10. Co 76. 153. 2. Wils. 205. 275. 292. 1. Bl. Cro. Car. 602. 1. Vent. 273. 1. Lev. Rep. 555.

Anonymous. Case 53.

PER HOLT, *Chief Justice*. No man that keeps a *publick-house* ought to be A CONSTABLE.

Constable. 1 Ld. Ray. 138.

Anonymous. Case 54.

NOTE *per* HOLT, *Chief Justice*. If, before a writ be taken out, an attorney promise to *appear* to it, and it is afterwards taken out, and shewed to him, he ought to appear; but that is no actual appearance; but if such undertaking be after the writ is actually taken out, it is an appearance.

If an attorney undertake to appear, he shall be compelled to file appearance. Ante, 16.

Post. 86. 1. Stra. 114. 445. 693. and see the rule upon this subject, Mich. Term 1654, Tidd's Prac. 124.

The Queen *against* Orbell. Case 55.

THE INDICTMENT stated, that the defendant fraudulently, and *per conspirationem*, to cheat *J. S.* of his money, got him to lay a certain sum of money upon *a foot-race*, and prevailed with the party to run booty.

Indictment for cheating upon a foot-race.

S. C. 12. Mod. 499. 2. Show. 341. Post. 61. 105. 301. Ld. Ray. 365.

THE COURT would not quash it upon motion (*a*), for they said, that being *a cheat*, though it was private in the particular, yet it was publick in its consequences.

AND NOTE, The defendant, after this motion, would not plead till he was served with a peremptory rule.

After a peremptory rule to plead to an indictment for a misdemeanor, it shall be tried the same Term.—Post. 114. 4. Com. Dig. "Indictment" (L).

(*a*) See 4. Com. Dig. "Indictment," (H.)

The Queen *against* Oabell.

And for that reason, by the course of the Court, it was said, that his plea ought not to be received without bail to try it the same Term; whereas if he had pleaded freely, he need not try it till the next Term.

And ordered PER CURIAM, to give bail to try it this Term, or the sitting after.

Case 56. Chetly *against* Wood.

In debt on a recognizance in the Common Pleas, if the declaration state it as taken before SIR GEORGE TREBY *et sociis suis*, and it appear to have been taken before another Judge at chambers, and by him delivered to the Court, *the variance* is fatal.

S. P. post. 132.
S.C. 1. Salk. 564.

IN debt upon a recognizance, the plaintiff set forth a recognizance acknowledged in the court of common pleas before SIR GEORGE TREBY, *et sociis suis*; and upon *nul tiel record* pleaded, the record was produced, and was a recognizance taken before JUSTICE NEVIL, in his chamber in *London*, and brought by him and delivered into court after at *Westminster*.

The question was, Whether this were *a failure of record?*

It was agreed, that recognizances in this court are always entered as present in court, and never mention a day certain; but in the court of common pleas they make an entry of a recognizance entered into at a Judge's chamber on a day certain, and there it binds land from the very day of the caption, and a *scire facias* may be brought upon it in either county, that is, in *London* or in *Middlesex* (*a*).

* [43]
S.C. 2. Salk. 659.
S. C. Holt, 612.
S. C. Ld. Ray. 966.

* And being moved again at another day, it was offered, that it was a constant practice in the common pleas, for above these twenty years, to recite recognizances taken at Judges chambers, as taken in court.

8. Mod. 290.
11. Mod. 45. 53. 223. 253.
Ld. Ray. 84. 757. 819. 1141. 1170. 1515.
1. Wms 334. 340.

To which HOLT, *Chief Justice*, answered, Then they must make their entry so, or else their usage is contrary to law, and not to be regarded; but here the entry is made, that the recognizance was taken in *London* before a Judge in his chamber.

And PER TOTAM CURIAM, here is a variance (*b*).

(*a*) See the case of Hall *v.* Winchfield, Hob. 195.

(*b*) See Rex *v.* Lockup cited 1. Term Rep. 240.

Case 57. Anonymous.

Justices of peace need not sign the *return of certiorari*.

A WRIT of *certiorari* was directed to justices of the peace to remove an indictment of forcible entry, and the return was void.

PER CURIAM. The justices names need not be subscribed to it, but it should be *responsio justiciar. &c. patet*; and it should state them to be justices *of our lady the queen*.

But

But before this was discovered it was filed, and the recognizance into which the party had entered, for laying the cause in pursuance of late act of parliament (*a*), was estreated.

A *certiorari* to remove an indictment is no *supersedeas*, unless recognizance be given, pursuant to the 5. and 6. *Will. & Mary*, c. 11.

And THE COURT said, that if the party that removes an indictment by *certiorari* do not enter into recognizance to try it the next assize or Term, or at the sitting within the Term, the *certiorari* is no *supersedeas* (*b*).

10. Mod. 193. 1. Burr. 11. Burr. 1462.

SECONDLY, That failing of trying is a forfeiture of recognizance, after which they will not hear a motion in arrest of judgment.

No motion in arrest of judgment after recognizance forfeited.

But they doubted whether for this want of a due return, being a kind of *album breve*, they should order the justices to make a return, and respite the recognizance in the mean time.

NOTE PER CURIAM. After *certiorari* returned and filed, no *procedendo* can go (*c*).

No *procedendo* after *certiorari* filed.

(*a*) 5. and 6. *Will. & Mary*, c. 11 and 8. and 9. *Will.* 3. c. 33. See 2. Hawk. P. C. ch. 27. s. 48.

(*b*) See the Queen *v.* Bothel, ante, 33.

(*c*) See the Queen *v.* Bothel, ante, 33. Anonymous, ante, 40.; The Queen *v.* Dixon, post. 61.: but if the cause suggested to obtain a *certiorari* shall appear to be false, a *procedendo* shall go, although the return be filed, Anonymous, 1. Salk. 144. but the writ must be first superseded, *quia improvide emanavit*; and the return be taken off the file, Rex *v.* Wakefield, 1. Burr. 488. for a *procedendo* cannot be moved for while it is upon the file, Rex *v.* Lewis, 4. Burr. 2459.

Anonymous. Case 58.

PER CURIAM. If a number of persons meet peaceably on a lawful occasion, and a sudden fray happen between them, it cannot be made *a riot*; but if several meet upon an unlawful occasion, and a sudden fray happen between them, and a person who came upon a lawful occasion join in the fray (*a*), it may make him a rioter as well as the rest.

What shall constitute A RIOT. Skin. 118. 1. Salk. 595. 1. Hawk. P. C. ch. 65. s. 3. 4. Com. Dig. "Forcible Entry" (D. 8.).

(*a*) See the case of Rex *v.* Royce, Burr. 2073.

Anonymous. Case 59.

HOLT, *Chief Justice.* You cannot except against a juror upon a writ of inquiry.

No exception to a juror on a writ of enquiry.

Ante, 40. Carth. 70. 86. 362. 371.

Anonymous. Case 60.

INDICTMENT for exercising *artem mysteriam, sive occupationem des les taylors*, not having served, &c. quashed (*a*).

Indictment on 5. *Eliz.* c. 4.

(*a*) See the case of Davison *v.* Barber, Hob. 183.

Case 61. **The Queen *against* Crosse.**

An *attachment* lies for speaking contemptuously *of the Court* on being arrested.

CROSSE confessed on interrogatories, that a *copy of a writ* being served upon him, and the writ shewed, and before he knew the contents of it, or out of what court it was, he had spoke with contempt; and this was judged a contempt.

Post. 74. 7. Mod. 31. 1. Salk. 84. 1. Stra. 185. 567. Sayer, 47. 114. 2. Stra. 1068. Ld. Ray. 1364. 2. Com. Dig. "Chancery," (D. 3.) 2. Hawk. P. C. ch. 22. f. 36.

* [44]

Case 62. *** The College of Physicians *against* Rose.**

An *apothecary* visiting a patient, judging of his disease, and sending in medicines for its cure, is not a *practising of physick* contrary to the 14. and 15. *Hen.* 8. c. 5. provided he only charge for the *medicines*, &c.

S. C. 16. Viner, 341.
S. C. 3. Salk. 17.
S. C. 1. Brown, P. C. 78.
2. Salk. 451.
2. Show. 158.
4. Mod. 47.
5. Mod. 327.
Comy. 79.

AN action on the statute 14. & 15. *Hen.* 8. c. 5. for practising physick within seven miles of *London* without licence.

The case, upon a special verdict, was, that the defendant being *an apothecary* by trade, was sent to by *John Scale*, then sick of a certain distemper; and he having seen, and being informed of the said distemper, did, without prescription or advice of *a doctor*, and without any fee for advice, compound and send to the said *John Scale* several parcels of physick as proper for his said distemper, only taking the price of his drugs.

The question was, Whether this is a practising of physick, such as is prohibited by the statute?

And after several arguments, THE COURT at last unanimously agreed, that practising of physick within this statute, consists,

FIRST, In judging of the disease and its nature, from the constitution of the patient, and many other circumstances.

SECONDLY, In judging of the fittest and properest remedy for the disease.

THIRDLY, In directing or ordering the application of the remedy to the disease: and that the proper business of *an apothecary* is to make and compound, or prepare the prescriptions of *the doctor* pursuant to his directions.

AND IT WAS AGREED, that the defendant's taking upon himself to send physick to a patient as proper for his distemper without taking aught for his pains, is plainly a taking upon himself to judge of the disease and fitness of remedy, as also the executive or directing part.

ET PER TOTAM CURIAM, The plaintiff had judgment.

NOTE, This judgment was reversed in the house of lords, *et juste*, &c.

Case 63. **Ford *against* Lord Grey.**

In ejectment, the possession of one jointenant is the possession of the other, so as to prevent the statute of Limitation.—5. Mod. 385. 2. Jones, 27. Salk. 205. 5. Burr. 2635. Run. Eject. 17.

AT a trial at bar in ejectment, the *statute of Limitation* being pleaded, these several points were ruled upon evidence:

FIRST,

FIRST, That the possession of one *jointenant* is the possession of the other, so as to prevent the statute (*a*). FORD *against* LORD GREY.

SECONDLY, That in proving an entry and claim, it is necessary to prove the claim to be upon the land claimed (without special cause): and also that it be *animo clamandi*. Evidence of a claim. S.C. 1. Salk. 285. Co. Lit. 253.

3. Wils. 523. 3. Com. Dig. "Claim," (A. 2.)

THIRDLY, If a man make an answer in chancery prejudicial to his title, and afterwards convey away his estate, this answer cannot be read against the alienee by any claiming under the alienor. Answer of *alienor* cannot be read against *alienee*.

2. Vent. 72. 3. Mod. 259. 4. Com. Dig. "Evidence," (C. 3)

FOURTHLY, That the recital of a lease in a deed of release, is good evidence of a lease against the releasor, and those that claim under him. The recital of a lease is evidence of a lease. 2. Lev. 108, 109.

* FIFTHLY, A fine was produced, but no deed declaring the uses; but a deed was offered in evidence which did recite a deed of limitation of the uses; and the question was, Whether that was evidence?—And THE COURT said, that the bare recital of a deed was not evidence; but that if it could be proved that such a deed had been, and lost, it would do if it were recited in another. And it not being proved that ever there was a deed leading the uses of the fine, the Counsel of one side opposed the same deed of recital's being at all read: but THE COURT said, "We cannot hinder the "reading of a deed under seal; but what use is to be made of it, "is another thing." * [45] The bare recital of a deed of uses upon a fine, is evidence of it when the deed is lost. Prec. Ch. 59, 64. 116. Ld Ray. 154. 746. 801. 12. Mod. 24. 231. 494. 579.

339. 10. Mod. 42. 4. Com. Dig. "Evidence" (B. 5.).

SIXTHLY, A deed bore date in the twenty-second year of *Charles the Second*, in the year of Our Lord 11671. And notwithstanding that mistake, the year of the king being certain, it was well. A deed is good, though *anno Domini* be mistaken. Co. Lit. 6. a.

2. Co. 5. 2. Roll. Abr. 21. 1. Salk. 462. 4. Com. Dig. "Fait" (B. 3.).

SEVENTHLY, If there be two joint tenants in fee, and one of them levy a fine of the whole, this amounts to no *ouster* of his companion, but it is *a severance* of the jointure, though he be in of the old use again; as if a man seised of a manor levy a fine of the *demesnes*, the manor is gone for ever, *Sir Moyle Finch's Case*; and after the fine, though he has the same old estate, yet he has it in another manner; for the fine, being *sur conusance de droit come ceo*, presupposes a feoffment; and if one seised as heir to the mother, levy A FINE *sur grant et render*, the estate shall go to the part of the father (*b*); otherwise of other fines. If one joint-tenant levy a fine of the whole, it is a severance, although it be to the old uses. Hob. 27. Co. Lit. 191. 337. Jones, 58. Prec. Ch. 124.

Stra. 12. 4. Com. Dig. "Estates" (K. 5.).

EIGHTHLY, A deed of title to lessor of the plaintiff of a will, (suppose, except *Black-acre*,) the *statute of Limitation* being pleaded, and an entry and claim being offered in evidence to avoid it, they were put to prove the entry to have been in another place than was excepted. Entry upon an exception. Salk. 391. Ld. Ray. 750.

(*a*) See Empson *v*. Shackleton, 2. Bl. Rep. 690. and S. C. 5. Burr. 2604.

(*b*) See 3. Com. Dig. "Discent" (C. 7.).

Ashby

Case 64. Ashby *against* White.

Record of an act. on the case brought by *a voter* against the *returning officer* for refusing to take his *poll* at the election of a member of parliament.

BUCKINGHAMSHIRE, } MATTHIAS ASHBY complains
to wit. } of *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, being in the custody of the marshal of the *Marshalsea* of the lord the king before the king himself, for that, to wit, That whereas on the twenty-sixth day of *November*, in the twelfth year of the reign of the lord the now king, a certain writ of the said lord the now king issued out of the court of chancery of him the said lord the now king at *Westminster* in the county of *Middlesex*, directed to the then sheriff of *Buckinghamshire* aforesaid, reciting that the said lord the king, by the advice and assent of his council, for certain arduous and urgent businesses concerning him the said lord the king, the state, and the defence of his realm of *England*, and of the church of *England*, had ordained his certain parliament to be holden at his city of *Westminster* on the sixth day of *February* then next coming, and there with the prelates, nobles, and peers of his said kingdom to have discourse and treaty, the said lord the now king commanded the then sheriff of *Buckinghamshire* by the said writ firmly enjoining, that, having made proclamation in his next said county after the receipt of the said writ to be holden, of the day and place aforesaid, two knights girded with swords, the most fitting and discreet of the county aforesaid, and of every city of that county, two citizens, and of every borough two burgesses of the more discreet and most sufficient, should be freely and indifferently chosen by those whom such proclamation should concern, according to the form of the statute thereupon made and provided, and the names of the same knights, citizens, and burgesses so to be chosen, to be inserted in certain indentures thereof to be made between him the then sheriff and those who should be concerned at such election (although such persons to be chosen should be present or absent), and should cause them to come at the said day and place, so that they the said knights, citizens, and burgesses, might severally have full and sufficient power for themselves and the commonalty of the county, cities, and boroughs aforesaid, to do and consent to those things which should then happen to be ordained there of the common-council of the said realm of him the said lord the now king (by God's assistance), upon the businesses aforesaid, so that for want of such power, or because of an improvident election of the knights, citizens, and burgesses aforesaid, the said businesses might not in any wise remain undone, and should certify without delay that election made in the full county of him the then sheriff, distinctly and openly under his seal and the seals of those who should be concerned at that election, to the said lord the now king in his chancery at the said day and place, sending to him the said lord the king the counterpart of the indenture aforesaid, sewed to the same writ together with that writ; which said writ afterwards, and before the

the fixth day of *February*, in the writ aforefaid mentioned, to wit; on the twenty-ninth day of *December*, in the twelfth year abovefaid, at the borough of *Aylefbury* in the faid county of *Bucks*, was delivered to one *Robert Weedon*, *Efq.* then fheriff of the fame county of *Bucks*, to be executed in form of law; by virtue of which faid writ the aforefaid *Robert Weedon* being then and there fheriff of the county of *Bucks* aforefaid, as before is fet forth, afterwards, and before the aforefaid fixth day of *February*, to wit, on the thirtieth day of *December*, in the twelfth year abovefaid, at the borough of *Aylefbury* aforefaid in the faid county of *Bucks*, made his certain precept in writing under the feal of him the faid *Robert Weedon* of his office of fheriff of the county of *Bucks* aforefaid, directed to the conftables of the borough of *Aylefbury* aforefaid, reciting the day and place of the parliament aforefaid to be holden, thereby requiring them and giving to them in command, that having made proclamation within the borough aforefaid of the day and place in the fame precept recited, they fhould caufe to be freely and indifferently chofen two burgeffes of that borough of the more difcreet and moft fufficient, by thofe whom fuch proclamation fhould concern according to the form of the ftatutes in fuch cafes made and provided, and the names of the faid burgeffes fo elected (although they fhould be prefent or abfent), to be inferted in certain indentures between the faid fheriff and thofe who fhould have intereft in fuch election, and that he fhould caufe them to come at the day and place in the fame precept recited, fo that the faid burgeffes might have full and fufficient power for themfelves and the commonalty of the borough aforefaid to do and confent to thofe things which fhould then happen to be ordained there of the common-council of the faid realm (by God's affiftance) upon the bufineffes aforefaid, fo that for want of fuch power, or becaufe of an improvident election of the burgeffes aforefaid the faid bufineffes might not remain undone, and that they fhould without delay certify the election to him the faid then fheriff, fending to the fame fheriff the counterpart of the indenture aforefaid annexed to the faid precept, that he the faid fheriff might certify the fame to the faid lord the king in his chancery at the day and place aforefaid; which faid precept afterwards, and before the faid fixth day of *February*, to wit, on the fame thirtieth day of *December* in the year abovefaid, at the borough of *Aylefbury* aforefaid in the faid county of *Bucks*, was delivered to them the faid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon* then, and until and after the return of the fame writ being conftables of the borough of *Aylefbury* aforefaid, to be executed in form of law; to which faid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, by reafon of their office of conftables of the borough aforefaid, the execution of that precept of right did then and there belong: by virtue of which faid precept, and by force of the writ aforefaid, they the faid burgeffes of the borough of *Aylefbury*, being in that behalf duly forewarned, afterwards, and before the fixth day of *February*, to wit,

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on

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on the sixth day of *January*, in the twelfth year abovesaid, at the borough of *Aylesbury* aforesaid, before them the said *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, the constables aforesaid, were assembled to elect two burgesses for the borough according to the exigency of the writ and precept aforesaid, and during that assembly to that intention, and before such two burgesses, by virtue of the writ and precept aforesaid, were elected, to wit, on the day and year last abovesaid, at the borough of *Aylesbury* aforesaid, in the county aforesaid, he the said *Matthias Ashby* then and there being a burgess and an inhabitant of the borough aforesaid, and not receiving alms there or any where else then or before, but being duly qualified and intitled to give his vote for the choosing of two burgesses for the borough aforesaid, according to the exigency of the writ and precept aforesaid, before them the said *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, the four constables of that borough, to whom then and there it did duly belong to take and allow the vote of him the said *Matthias Ashby* of and in the premises, was ready and offered to give his vote for choosing *Sir Thomas Lee*, *Bart.* and *Simon Mayne*, *Esq.* two burgesses for that parliament, by virtue and according to the exigency of the writ and precept aforesaid; and the vote of him the said *Matthias* then and there of right ought to have been admitted, and the aforesaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, so being then and there constables of the borough aforesaid, were then and there requested to receive and allow the vote of him the said *Matthias Ashby* in the premises: nevertheless, they the said *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, being then and there constables of the borough aforesaid, well knowing the premises, but contriving and fraudulently and maliciously intending to damnify him the said *Matthias Ashby* in this behalf, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him the said *Matthias Ashby* to give his vote in that behalf, and did then and there absolutely refuse to permit him the said *Matthias Ashby* to give his vote for choosing two burgesses for that borough to the parliament aforesaid, and did not receive, nor did they allow the vote of him the said *Matthias Ashby* for that election: and two burgesses of that borough were elected for the parliament aforesaid (he the said *Matthias Ashby* being excluded as before is set forth), without any vote of him the said *Matthias Ashby*, then and there by virtue of the writ and precept aforesaid, to the enervation of the aforesaid privilege of him the said *Matthias Ashby*, of and in the premises aforesaid: whereupon the said *Matthias Ashby* saith that he is injured, and hath sustained damage to the value of two hundred pounds, and thereupon he brings suit, &c.

Ashby

Ashby *against* White. Case 65.

IN an action on the case, the plaintiff declared, that on such a day in *December*, in the twelfth year of the late king, there issued a writ to the *sheriff of Bucks* for the election of members of parliament in his county; that the said writ was delivered to the said sheriff; whereupon the sheriff made his warrant to the *constable of Ailesbury*, to choose *two burgesses* for that borough, which warrant was delivered to the said constable: that in pursuance thereof the burgesses were duly assembled to choose, &c.; that the plaintiff being then duly qualified to give his voice for the election of two burgesses before the said *White*, he was ready to give his voice for *Lee* and *Mayne* to be burgesses of parliament for the said borough; and that the defendant, knowing the premises, with malice, &c. did obstruct him from giving his voice, and did refuse it, and not allow or receive it, and that two burgesses were chose without allowing or receiving his voice: Verdict for the plaintiff.

A person who has a right to vote for the election of members to serve in parliament, may maintain an action against the sheriff or other officer who takes the poll, for refusing to admit his vote, although the right of such elector to vote was never determined in parliament, and although the candidate for whom he tendered his vote, was returned *duly elected* by the officer who refused the vote.

And now THE COURT argued *seriatim*, THREE JUDGES against the plaintiff, and HOLT, *Chief Justice*, *totis viribus* for him.

* GOULD, *puisne Justice*, against plaintiff, for four reasons:

*[46]

FIRST, The constable in this case is to judge who shall vote or not, and as such is not liable to actions: a sheriff shall not be liable to an action for taking insufficient bail, because he is judge of their sufficiency (*a*). An action for taking bail, having nothing in the county, does not lie (*b*). In an action of escape upon process, the defendant pleads, that he let him go upon sufficient bail, and it was held that the sufficiency of the bail is not traversable (*c*). In the case of *Hammond v. Howell* (*d*), the jury were fined for a verdict against evidence, and held ill: and in the *Year-Book* it is held, that (*e*) a Judge is not liable to an action for making up a false record.

S.C. 1. Salk. 19. S.C. 3. Salk. 17. S.C. 8. St. Tr. 89. S.C. Holt, 524. S.C. 1. Brown. P.C. 45. S.C. Ray. Ent. 320. S.C. 2. Ld. Ray. 938. Post. 49. 2. Lev. 114. 1. Mod. 145. 5. Mod. 311. 7. Mod. 13. Poll. xf. 470. 2. Salk. 503. 10. Mod. 54. 12. Mod. 26. Ld. Ray. 907. Vide postea.

SECONDLY, This is a parliamentary offence, with which we have nothing to do by way of action; for we cannot examine, whether the party refused has a right to vote, or not, for that properly belongs to THE HOUSE OF COMMONS to determine; and suppose the question be, Whether the right of voting be in a select number, or in the populace? and the defendant refuse the plaintiff for being of the populace; and we judge him to have the right of voting, being of the populace, and upon that ground give judgment for the plaintiff, and after the right of election in that borough comes in question in parliament, and there the right is adjudged to be in a select number; this will occasion a concurrency of independent jurisdictions, which will be wonderfully inconvenient. In the case of *Dawson v. Sheriff of London* (*f*), it is held, that

(*a*) Metcalf *v.* Hodgson, Hutton, 120.
(*b*) In the king's bench, 21. *Car.* 2. Roll. 469.
(*c*)
(*d*) 2. Mod. 219.
(*e*) Year-Book 9. *Hen.* 6. pl. 6.
(*f*) 2. Vent. 87.

even

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even for a false return an action does not lie, for there are no precedents of any before the statute of *Hen.* 6. c.

THIRDLY, Here is no profit present, or possibility of a future profit, so it is an *injuria sine damno*; and *damnum sine injuriâ*, or, *vice versâ*, will not bear an action, for both must necessarily concur to maintain the action; for things must not only be done amiss, but it must redound to the prejudice of him that will bring his action for it (*a*). If a man forge a bond in my name, it is possible I may be damnified by it, but until it be put in suit against me, I cannot bring action against the forger (*b*).

FOURTHLY, This relates to the government, and is a kind of a popular offence, and for that an action will not lie for it; for by the same reason that an action would lie for the plaintiff, it might lie for two hundred upon the same single question; and suppose we all should give judgment in so many actions against him, and after the matter is decided otherwise in parliament, what remedy has this poor officer? and the avoiding multiplicity of actions, is the reason of *Williams' Case* (*c*). And *Boulston's Case* in the same book (*d*), Actions lie not by any particular person against one that not being qualified builds a dove-cote, but is punishable in the leet; but I do not say but that after the right is determined in parliament, it might be proper for an information (*e*). As to the reason that such action never has been, therefore it does not lie, I do not much depend upon it. In the case of *Guntley v. Holmes (f)*, there is no remedy there for the party grieved but an action, but here is a remedy in parliament. Besides these reasons, it
*[47] is not alledged that any return * was made of the members chose
Post. 122. without his consent or vote, and the action does not lie to be sure before the return (*g*), for until then the party has no damage.

POWYS, *Justice*, *accord.* for these reasons:

FIRST, The officer in this case, though not properly and strictly a judge, yet he is *quasi* a judge; for he has a distinguishing power who shall be admitted to vote, and who not; not indeed finally and conclusively, but at that time who to admit, and who to refuse; but all he does is obnoxious to a subsequent examination in parliament.

SECONDLY, If such an officer misbehave himself, in certain cases acts of parliament have already given remedy; and this case may come incidently in question, and be determined upon such actions as the statutes have provided; and the statute giving

(*a*) Year-Book 19. *Hen.* 6. c. 24.

(*b*) Year-Book 6. *Edw.* 4. pl. 7. 19. *Hen.* 6. pl. 44. cited in the case of Wateris v. Freeman, Hob. 267. See also Fuller *v.* Young, 2. Bulst. 268.

(*c*) 5. Co. 73.

(*d*) 5 Co. 104.

(*e*) See 2. Brownl. 194. Cro. Jac. 268. upon the same reason.

(*f*) 2. Cro. See also Herring *v.* Finch, 2. Lev. 250. Turner *v.* Sir Samuel Sterling, 2. Vent. 25.

(*g*) 2. Bulst. 255.

remedy

remedy in one case, and being silent in all other cases, seems to expound the common law in this point. ASHBY against WHITE.

THIRDLY, This would subject mayors and such officers to such an infinity of actions, as would not only ruin them, but also deter every body from exercising the like office; for the heats in elections are so great, that the losing party would never fail of bringing every man his action, which the Court could not join in one, and so the poor officer would be undone; whereas the whole matter might be fairly determined by an action for a false return by either candidate, according to the statute.

FOURTHLY, There is such intricacy in elections, that scarce any two towns agree: in some boroughs, a select number has the government: in some, all that pay scot and lot: in some, pot-wallers, or house-keepers, &c. so that it would be hard to make an officer distinguish them at the peril of an action.

It is objected, that by law every man that has an injury done him, ought to have a remedy therefor; and that it would be strange to tell *an Englishman*, that he has a wrong done him, and no redress for it. I ANSWER, This is no wrong to him, for he does not lose his privilege of voting by it; for if an action be brought for a false return, or a petition be preferred to THE HOUSE, if he has a right, THE HOUSE will reckon his vote as much as if it had been received at the election (*a*); and besides, if it be an injury, it may be one of those that come within the rule, *De minimis non curat lex*. Before the statute of 23. *Hen.* 6. c. 14. the party it cited had no remedy in case of *false return* (*b*); and before the statute of 7. and 8. *Will.* 3. c. 7. no action lay for a *double return* (*c*).

FIFTHLY, That such an action was never brought before, and then LITTLETON'S argument on the *statute of Merton* (*d*), which though it be not a conclusive reason, yet thus far it may be urged, that it shews the law is not apt to encourage actions where none was brought ever before: and it is said in *Onslow's Case*, that * the parliament could not be misconusant of double returns, and therefore, if they had thought it convenient, they would have provided a remedy. It may in like manner be said here, they could not be misconusant of denying of burgesses their votes. [48

SIXTHLY, The determination of all disputes concerning elections properly belongs to THE HOUSE to determine, and it is a fundamental right of theirs to determine who are to be the constituent members of their own body; and the right decision of these things depends upon a parliamentary kind of learning, whereof most people are ignorant, as we may see by their being daily decided within THE HOUSE contrary to the opinions of all

(*a*) Ford *v.* Hoskins, Cro. Jac. 368. S. C Moor, 842. S. C. 1. Roll. Rep. 125. S. C. 2. Bulst. 326.

(*b*)

(*c*) See Onslow *v.* Rapley, 3. Lev. 29 S. C. 2. Vent 37.

(*d*) V. de Cro. 1[illegible].

people

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people out of doors: and now in actions for false return, the last determination in parliament is what we must be concluded by.

SEVENTHLY, The clashing of jurisdictions that would be.

And as to the case of *Sterling v. Turner* (a), it is not like this; for that depended on a private custom of a corporation, and this here is parliamentary; and he quoted *Onslow's Case* (b), that the courts of *Westminster Hall* must not enlarge their jurisdiction (c).

Post. 55. 100. 3. Lev. 29. 2. Lev. 114.

As to the pleading, though he agreed that it would be bad on demurrer, for the generality of the allegation, "that he was ready to "give his vote, and that they hindered him, &c." yet after verdict he held it well enough. And he concluded for the defendant.

POWELL, *Justice*. At the first opening of this case I was surprized with the novelty thereof, but that is no reason against it; for many actions are daily brought, the like whereof was never brought before. I do not agree with my brothers, that the officer here is *a judge*; nor do I know what *quasi* a judge is: sure this officer is only *a minister* to execute the sheriff's precept. But what moves me to be of opinion against the plaintiff is, that this is not such an injury or damage to the plaintiff as will maintain an action on the case; for *injury* is in relation to some *right* a man has, except it be where a man is hindered from trying whether he has a right or not, as was the case of *Turner v. Sterling* (d); and the case of *Ford v. Hoskins* (e) was upon solemn debate, and it was compared to the case of *cestuy que use* who could not maintain case against the feoffee for not executing possession. However, let that case be as it will, it does not oppose the *Case of Sterling*; for there was an old remedy in chancery to compel the lord to hold his court, in that case; and in the other, there was no manner of remedy but an action upon the case. It is objected, that the party here shews he has *a right*, and the jury find it upon their oaths. I answer, that his own allegation does not give him a right, and the jury are not judges whether he has a right or not; for it is a matter solely inquirable and determinable in parliament by their committee of election, whether their members be chose as
[49] they ought to be, * and what is that but to determine the right of voting? And there is no doubt but they have conusance of that matter. But it may be objected, that the determination of the right in parliament does not avail the party injured of his vote, nor repair him in damages. I answer, that at least you come too soon for this action, before it be determined in parliament whether you have a right; and indeed, if it may be called *a right*, it is so dubious and uncertain a right, that it is extremely hard to say, until it be determined, that a man may be injured in it so as to bear an action:

(a) 2. Lev. 50. 3. Keb. 26. 32. 1. Vent. 206. 2. Vent. 25.
(b) 2. Vent. 37.
(c) 2. Bulst. 368.
(d) 2. Lev. 50. 3. Keb. 26. 32. 1. Vent. 206. 2. Vent. 25.
(e) Cro. Jac. 368. Moor, 842. 1. Roll. Rep. 125. 2. Bulst. 326.

and

and the plaintiff has a proper remedy, if he has a right, by application in parliament; and when the matter is there determined, he may then bring his action for his damages; for I agree, it would be hard to suppose an injury without the means for a reparation in damages. There be but few cases in our Books to this purpose, but the case in *Hob.* 318. comes up to the reason of it: If a church become litigious, so that there are two persons in contest about it, the ordinary's safe way is to ascertain the title by a *jure patronatûs*: if, after, he admit the wrong person, contrary to the inquest of the *jure patronatûs*, and the rightful patron recover in *a quare impedit*, he shall after have an action on the case against the ordinary, but not before the right is determined in a former action. So here you should ascertain your right in a proper way, and then bring your action: and there is great reason for this, for the right may be determined quite contrary by parliament; and if we give damages and judgment against the defendant, and after the matter comes before the parliament, who determine against the plaintiff, What remedy has the defendant? This is a monstrous mischief, only to be prevented by staying until the matter be determined in parliament.

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Ante, 45.
2. Lev. 50. 114.
2. Keb. 435.
Pollex. 470.
2. Keb. 356. 664. 433.
Lutw. 88, 89, &c.

BESIDES, as it appears on *the declaration*, there is not sufficient damages to maintain it; for every injury, to maintain an action, must have a real present damage, or a possibility of a future one: as where one has a market and toll, and another is coming with goods to the market, for which, if sold, toll would be due, and a third person hinders him from coming to the market, an action lies for the lord of the market, because of the possibility of damages.

ANOTHER FAULT in the declaration is, that he does not particularly tell how the defendant obstructed him, as that he shut him out; and though it be after verdict, yet the declaration must be so certain as to be substantial: for if an action be brought by him in reversion, for refusing to let him come upon the ground to see waste, and he only say that he obstructed him, and do not shew how, a verdict will not help it.

AGAIN, It is "*penitus recusavit.*"—Indeed, if it were a thing that lies in demand, as a *rent-seck*, there demand and saying *recusavit* is enough; but here he says *he refused his vote*. What then? If he gave it, it is nevertheless a vote for the officer's refusing it; and if there were room * to controvert it, it would have been looked upon as much a vote as if it had not been refused. *[50]

Then this right of voting has no profit in it, and it is as criminal to take money for it as to sell a presentation, as far as I can see; yet there were no damages in *quare impedit* at common law; therefore why here? And if so, no action ought to be.

The multiplicity of actions, which the law will never suffer but upon failure of other remedy, and that is the reason of *the Case of the Common Watering-Place in Southwark*, because there was no

other

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other remedy; but if an indictment would have lain, no action could have been maintained there; but here is another remedy: and he agreed, the case of *Hemming v. Finch*, that an action will lie for refusing a freeman his vote in chusing a mayor, but there the party has no other remedy: besides, this would be a great discouragement to sober, discreet men to meddle with these offices, and the difficulty of elections, and right of voting, in some corporations is very great. So being an action of the first impression, attended with many inconveniences, and the right determinable elsewhere, I am against the plaintiff: But after right determined in parliament, for the trouble and charge the party is at in prosecuting his right, an action may lie.

HOLT, *Chief Justice*. The case is truly opened and stated; and the only question is, Whether or not, if a burgess of a borough, that has an undoubted right to give his vote for the chusing a burgess of parliament for that borough, be refused and obstructed from giving his vote; whether, I say, he has any remedy in the king's courts for this wrong against the wrong-doer? All MY BROTHERS agree, that he has no remedy; but they differ in their reasons. I cannot agree with them, for I think the action well maintainable. AND FIRST, I shall consider the reasons given by my Brothers. The first reason given by my BROTHER GOULD is, that this officer is a judge of the matter, and therefore no action lies against him: but BROTHER POWYS does not wholly concur with him in that; he says, he is only *quasi* a judge: but BROTHER POWELL thoroughly explodes that reason, and says, he is neither a judge, nor any thing like a judge. And certainly he is in the right of it, for he is nothing like a judge; for, What has he to do as judge? The sheriff receives the writ, and is commanded to execute it, and thereupon he makes a precept to the officer of the borough by virtue of the writ; and, What has he to do but to call the town together, and give them notice to come and make their election, and then to receive their votes and cast them up, and return him chose that has the majority? And all this is purely *ministerial*. But the method I shall observe in maintaining my opinion is,—FIRST, To shew that the plaintiff has a right and
[51] privilege to give his vote.—* SECONDLY, That in necessary legal consequence of this right, if he be hindered or obstructed in the exercise or enjoyment of it, the law gives him an action. And THIRDLY, That this is the proper action the law gives him to vindicate his right, and recover damages for the injury done. I did not think it difficult to prove that he has *a right*; but it may be necessary to shew that he has a right *vested* in him to maintain this action. It is not doubted but that THE COMMONS OF ENGLAND have a considerable property in the estates of the land; and that for that reason they have a great part of the legislative authority, without whose consent no new law can be made, no old one abrogated, or taxes given: but because the vast number of which the community is made renders it impracticable for them

all

all to exert this right, therefore, by the conſtitution of the land, they are to ſend particular members choſen by and from themſelves to parliament, who, when they are choſe, have the full power and authority of thoſe that ſent them; that is, KNIGHTS *for ſhires*, CITIZENS *for cities*, and BURGESSES *for boroughs:* theſe are the three ſorts of perſons qualified to have this great truſt repoſed in them. FIRST, As to *knights of ſhires*, the election of them belongs to the freeholders of the county; and this is an original right veſted in them, and inſeparably incident to their freehold; and a freeholder cannot be deprived of this right no more than of his freehold. Before the ſtatute of 8. *Hen.* 6. c. 7. any man that had a freehold of ever ſo ſmall a value had a power to give his vote at the election of a knight of the ſhire; and that ſtatute recites the miſchief thereof, and confines that power to a freehold of forty ſhillings *per annum:* yet though it be confined to that value, and inferior freeholders excluded, ſtill it remains an original right to the freehold of thoſe that have a right of voting, or that have a freehold above forty ſhillings or of that value *per annum*. The SECOND SORT is of *citizens*, and *burgeſſes:* I put them together, becauſe they both are upon the ſame foundation, and no difference between them, but only that *a citizen* is of greater dignity; in all other things they agree. Now there are two ſorts of *boroughs:* THE FIRST, where the electors give their votes in reſpect of their burgages: THE SECOND, where they give them as members of the corporation. The FIRST SORT, that vote by reaſon of their burgages, do it as freeholders of houſes within the borough by burgage-tenure of the lord of the borough, which is a very ancient tenure, and holds place in the moſt ancient towns in *England*, that ſend burgeſſes to parliament, and the right of chuſing burgeſſes to parliament is incident to every tenant in burgage; *vid. Litt.* 162. ſo that it is * part of their conſtitution, whether incorporated or not; and the borough in queſtion is a borough not incorporated, and therefore this right is upon account of their *inhabitancy*, and not part of their *tenure*, but a privilege annexed to their burgage-lands, and is a real right belonging to their eſtate. THE OTHER SORT is, when there is A CORPORATION by *charter* or *preſcription*, that corporation by conſequence chuſes and ſends members to parliament; and whereas this right, in thoſe that hold by burgage-tenure, is a real intereſt annexed to their eſtate and inheritance, in thoſe that do it as freemen of a corporation either by charter or preſcription, it is a perſonal privilege, the inheritance whereof they have by their charter or by preſcription in ſuch manner as the charter or the preſcription directs; which right and inheritance is lodged, in point of right, in the whole body politic, though the exerciſe and poſſeſſion be in particular members purſuant to the ſpecial directions and limitations of the charter, or the uſage of the preſcription. If the corporation be begun within time of memory, it muſt be by grant; and he quoted the caſe of the town of *Dungannon* in *Ireland* (a). The town

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(a) 12. Co. 120. Hob. 15.

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was incorporated by the name of "Provoſt, Free Burgeſſes, and "Commonalty, &c." *et ulterius*, that the ſaid provoſt and free burgeſſes ſhould chuſe parliament-men; and it was held on debate, that the laſt clauſe veſted the ſaid privilege in point of intereſt in the CORPORATION, but confined the exerciſe to *the provoſt* and *burgeſſes*: ſo let the exerciſe be according to the charter or the preſcription, either in ſome particular members or in all, ſtill the right and intereſt is in the whole corporation: I ſay, that this is a diſtinct and particular right *veſted* in every member of the body politic, though the exerciſe be in a particular number; for if we but conſider the matter ſeriouſly, it is they whoſe perſons, eſtates, and liberties, are put in the power of the choſen member, that ought to have the right of voting for, and chuſing ſuch member, veſted in them, and it is not *quatenus* they are a corporation that they can give this power to bind their property, but it is as they are particular, private, natural perſons: as in *London*, the body politic does not pretend to the right, but it is in all the natural members that compoſe the corporation, though exerciſed by a ſelect number: and ſure the FREEMEN OF ENGLAND have too conſiderable an eſtate in this right to have it only lodged in a body politic; and when parliament-men were paid wages, it was paid not by the corporation, but by the whole community. Upon the back of a roll in the reign of *Edward the Third* (*a*), there is a writ directed to the mayor and aldermen of *N.* commanding them to raiſe from the community of the whole town; and abundance of other writs there are in like manner for raiſing the ſalary of parliament-men of the whole community, and not of the corporation; which ſufficiently ſhew that the corporation only is not repreſented, but alſo all the whole community; for none ought to contribute
53 but who is repreſented. * It is no new thing, but agreeable with reaſon and rule of law, for a franchiſe to be of an inheritance in a body politic, and the enjoyment and benefit of it to enure to the town in their private and natural capacity; and this is a caſe of conſtant experience: preſcription in the burgeſſes of *Derby* for common for their cattle, *levant et couchant* (*b*); ſo if it be a burgeſs, he has a diſtinct property and right as ſuch; if a freeman, he votes [illegible] his [illegible] capacity, and his perſon, eſtate, and liberty, are bound by it, therefore he has a right in it. I wonder to hear it ſaid, that it is ſo ſmall a right, as an injury offered to it ſhould be
1. Bac. Abr. 45. unpuniſhable, by the rule of *de minimis non curat lex*. Is it a little thing to have the privilege of giving a vote in the election of a perſon in whoſe power my life, eſtate, and liberty lie, obſtructed (*c*)? It is plain, that the want of this privilege occaſions damages, and the having it prevents it; ſo it is a great privilege

(*a*) 46. *Edw.* 3. memb. 4.

(*b*) 1 Saund. 343.

(*c*) See the ſtatute 33. and 34. *Hen.* 8 c. [illegible] and the ſtatute 25. *Car.* 2. c. 25. concerning *Cheſter* the one, and the other concerning *Durham*: AND NOTE the words "*Privileges*" and "*Liberties*" in them. NOTE *to the former edition.*

to

to vote for a parliament-man; and sure every one that has that great privilege has a right in it; and if so, of necessary consequence he has an action to vindicate and maintain that right.

Secondly, It is a vain thing to imagine that there should be right without a remedy; want of right and want of remedy are *termini convertibiles:* A man buys the inheritance of an advowson (*a*), and upon the next avoidance there is an usurpation, if there be no *quare impedit* within six months, he has lost his right because he has lost his remedy; for suppose upon the next avoidance he should present by usurpation, and die seised, his heir could not be remitted; so it is without a precedent to have a right without a remedy: one indeed may have both right and remedy, and lose his remedy, and by consequence his right. Would it not look strange to any man who has heard of our Constitution, that the Commons of England should have a share in the Legislature by members eligible by themselves, and that it should lie in the power of a sheriff or other officer to deprive any of them of so transcendent a right, and he to be without remedy by the law of *England*? Taking it then that the plaintiff has a right, it is most apparent on the record that this officer did exclude him from the enjoyment thereof. And in so doing he did well or ill; none will say that he has done well; then he has done the plaintiff wrong in so barring him of his right; and it is not at all material whether the candidate, that he would have voted for, were chosen or likely to be, for the plaintiff had a right to vote, and being hindered of that he has a wrong done him, for which he ought to have a remedy. If an act of parliament be made for the benefit of any person, and he is hindered by another of that benefit, by necessary consequence of law he shall have an action (*b*); and the current of all the books * is so. How comes an action of *scandalum magnatum*? The statute gives none; it was made for public peace; but being for the benefit of *great men*, of consequence an action lay for them; and that is the reason why a writ of error lies not in the Exchequer Chamber in an action of *scandal. magnatum*, because it is not any of the causes mentioned, but an action founded upon the statute. Now, if this be so in case of an act of parliament, why shall not common law be so too? For sure the common law is as forcible as any act of parliament: and the common law is, that a freeholder shall vote in choosing knights, &c. and if you have a right by law so to do, shall not that law give him an action against him that bars him of that right? By the statute of *Westminster the First*, *cap.* 21. all elections ought to be free; the words are general, "all elections." Now then when this act, which indeed is but an inforcement of the common law, takes this matter to be of so great consequence as to declare it, and give a new authority and sanction to it, sure it is a very bold stroke to say, that when a man is hindered in his election he has no remedy; and it cannot be less than a violation, and an opposition to that statute, to say, that he has no remedy, after that the statute has so manifestly interposed in it.

2. Inst. 39. 3. Cro. 135, 134. that it must be *tam pro domino rege quam pro seipso*.

* [54]

1. Vent. 34. 49. Hob. 43. 1. Cro. 142. 1. Jo. 194. 1. Cro. 535.

(*a*) See Brediman's Case, 6. Co. 58

(*b*) 12. Co. 100. 2. Inst. 118.

Thirdly,

Ashby gainst White.

Thirdly, That this is his remedy: My Brother Gould fays, and all my brothers agree with him, that he has no hurt done him; but I think it impoffible that there fhould be an injury without damage: injury in its nature imports damage, though it coft not the party injured a farthing; for damages do not confift in things pecuniary, but in a difturbance of right. If words be fpoken of a man whofe reputation is fo very intire that nobody believes the words, fo that he lofes nothing by them, yet becaufe it is an injury to a man to be ill fpoken of, he fhall recover damages. Suppofe one give another a cuff on the ear, but do not hurt him, yet for the indignity offered to his perfon an action lies. So if another ride in a path way in my land, I may have an action, becaufe it is an invafion of my property, and an injury to my right; and here the wrong being not *vi et armis*, fo as to maintain trefpafs generally, the law in that cafe gives this remedy. If a man has return and execution of writs, and another enters and executes a writ within his franchife, he fhall have action upon his cafe for the invafion upon the right; *à pari* here, for the party had a right, and the defendant difturbed him in the enjoyment of it.

Dyer, 26.

But it is objected, that here will be a multiplication of actions. I anfwer, So there ought; for if one will multiply injuries, it is fit the actions for the fame fhould be multiplied: as if in this cafe the defendant had taken upon himfelf to refufe forty votes, why fhould he not be liable to as many actions? For if he had beat forty men, every one of them would have an action againft him, for every man's damage is diftinct from the others. If many men are injured by one particular act, there the wrong-doer fhall be punifhed by way of indictment, becaufe actions fhall not be multiplied; but if there

[55] be but one man * offended by that particular act, or a more fpecial manner than others, he fhall have his action; and if he injure a third perfon by another particular act, he fhall have his action, *et fic in infinitum*. If there be a common, and one hundred common thereof, and one perfon dig a pit there, for that one pit every one of the hundred fhall have his action, becaufe of their feveral rights; but if a pit be dug in a highway, then it would be a common public nufance; and that is the true reafon of *Williams's Cafe* (a): And of the cafe of *Turner v. Sterling* (b), there he was not elected; for it could not appear who had the majority, he or his competitor; there he could not give his lofs of place in evidence for damage, becaufe he was not elected: but the caufe of complaint was, that it being difficult on the view to guefs who was chofe, he had a right to demand a poll, and the denial of that was an injury to his right, for which the action was held maintainable. And he quoted *Dowman's Cafe* (c): If a man make a leafe, the law gives him leave, when he thinks fit, to come and fee if there be wafte; and if he come to fee, and the leffee hinder him, although it do not appear what the damage was, or that any wafte was committed, yet he fhall have his action, becaufe he had a right, in the enjoyment whereof he was difturbed.

2. Lev. 50.
Poft. 1[illegible]
Ante, 48.
1. Vent 206.
2. Vent 2[illegible].
3. Keb. 25[illegible]

(a)
(b) 2. Lev. 50. 1. Vent. 206. 2. Vent. 25.
(c) 2. Roll. Rep. 19. S. C. Cro. Jac. 478.

My

My brothers say, "Oh! alas, here is a remedy in parliament; "we must be very tender, for the matter is nice, and the parliament "may judge this a different way."—I answer, that as this case is, they cannot go to parliament; for it is agreed, that those against whom he would have voted were elected, and his grievance here is, that he is not represented; for if a man be not allowed to give his vote, he is not represented; if he be allowed his vote, and the majority is against him, his vote is included in the majority; and the encouraging of remedies for injuries is the most effectual way to make these officers honest and observant of the constitutions of their cities and boroughs; and they would decline such practices as we daily see them guilty of. But it relates to parliament: What then? It is a matter that wholly depends on charter or on prescription, and they sure are things of which the queen's courts have conusance; and to judge of them is not to enlarge their jurisdiction; and if this be matter within our jurisdiction, we are upon our oaths bound to maintain it, more especially when they cannot go to parliament. If a freeman of a borough had applied to THE HOUSE OF COMMONS, for that he was denied his vote, they would have sent him to take his course at law. As to the authority of my *Lord Hobart* (*a*), it is true, my *Lord Hobart* is of that opinion, and it is a very fine one; but how it would hold on debate may be doubtful. There was indeed no damage in a *quare impedit* at common law, but the statute gives it against the disturber; and if the plaintiff in a *quare impedit* do not make the bishop a disturber, he is barred of the benefit of the statute: * but let that be how it will, it is not like this, because, as this case is, they can have no recourse to parliament to ascertain the right. As to the saying of *Littleton*, that such an action was never brought, and that therefore it lies not, it is true, *non-user* is a good argument where it is supported with reason, otherwise not; this saying was upon the *statute of Merton*, *cap*. 7.; the statute says, "that if a lord by "knight service married the heir under fourteen, where he was "disparaged, *si parentes conquerantur*;" and the question was, What was meant by *conquerantur*, whether it must be a complaint in a judicial manner? and it was agreed, that "*conquerantur*" was the same as if he had *cause of complaint*; and that, as a more severe construction against the lord, if he should be so unjust as to disparage his ward, he should lose him; and that in consequence must have been by an entry upon the lord; and that if they were disturbed, they should have an ejectment of ward, because the law gave them the custody: so, in that case, the argument is grounded on reason, from the very words of the statute, and the constant construction thereupon; and to carry it generally farther, and to extend it to all new cases, would destroy many late authorities; as the case of *Hunt v. Dowman* (*b*), in the seventeenth year of *James the First*, for hindering a lessor to see if waste were committed, which was the first of the kind; as was also the case of *Turner v. Sterling*.—Let us consider wherein the law consists; not in par- [56]

(*a*) Hob. 318. (*b*) Cro. Jac. 478. 2 Roll. Rep. 19.

 ticular

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ticular inſtances, but in the reaſon that rules them; *Ubi eadem ratio, ibi idem jus*. And if where one is injured in one ſort of right he has a good action, why ſhall he not have it in another? Or how does this differ from other caſes? For though THE HOUSE OF COMMONS have a right to determine elections, yet they cannot judge of the charter originally, but ſecondarily, or as incident to the determination of the election; and therefore where an election does not come in debate, as it does not in this caſe, they have nothing to do: and we are to exert and vindicate the queen's juriſdiction, and not to be frightened becauſe it may come in queſtion in parliament; and I know nothing to hinder us from judging of matters depending on charter or preſcription. The caſe of *Morſe v. Slew* (a) was the firſt of the kind: and the caſe of *Smith v. Crawſhaw* (b), an action for malicious indicting for treaſon. And he quoted a caſe of *Bodily v. Lawne* (c), in the LORD BRIDGMAN's time; for there an action was held maintainable for a man againſt ſome that had made *a riding* for him and his wife; the wife, it ſeems, having been uſed to henpeck her huſband.—And he concluded for the plaintiff.

Vide ante, 48. 1. Vent. 206. 2. Vent. 25. 1. Mod. 85. 2. Lev. 69. 2. Keb. 866. 3. Keb. 72. 112. 135. 3. Keb. 578.

NOTE, A *writ of error* was brought of this judgment before the lords, and THE JUDGMENT *reverſed*.

(a) 23. *Car.* 1. 1. Vent. 190. 238.
(b) W. Jones, 93.
(c) 15. *Car.* 2.

*[57]

Caſe 66.

* The Caſe of Sutton, Marſhal of the Court.

A leaſe of the office of marſhal of the king's bench for years, determinable on leſſee's death, is good.

SUTTON, *the Marſhal*, having not attended for two Terms, and a new marſhal being preſented to the Court to be ſworn in, he produced a leaſe from the patentees of the office for a certain number of years, determinable on his death.

And it was held PER CURIAM, that albeit a leaſe for years abſolutely of this office is void, yet a leaſe of it for years determinable upon the life of the leſſee is good; for the danger of the office going to executors or adminiſtrators is avoided; and that is the ſole reaſon why the office is not abſolutely grantable for years (a).

S. C. poſt. 91. S. C. 12. Mod. 557. S. C. Ld. Ray. 1005. Hob. 153. 1. Salk. 2. Ld. Ray. 159. 163. 853. 1038. 1245.

New marſhal ſworn upon his knees.

THE COURT ſaid, that they would ſwear this man in, without meddling with the poſſeſſion, and leave that to the determination of the law in the ordinary courſe.

And he took his oath upon his knees.

(a) See the ſtatutes 8. & 9. *Will.* 3. c. 27. and 27. *Geo* 2. c. 17.

The

The Queen *against* George. Case 67.

IT WAS AGREED, that the clause in the statute of 4. & 5. *Will. & Mary*, c. 23. against destroying the game, *viz.* "That in case "any hare, partridge, pheasant, pigeon, fish, fowl, or other game, "shall, upon such search or otherwise, be found, the offender shall "be carried before some justice of peace of the same county, "riding, or division; and if such person do not give a good "account how he came by such hare, partridge, pheasant, "pigeon, fish, fowl, or other game, such as shall satisfy the said "justice, or else shall not in some convenient time, to be set by "the said justice, produce the party of whom he bought the same, "or some other credible person, to depose upon oath such sale "thereof, that then such person not giving such good account, "nor producing any such witness as aforesaid, shall be convicted "by the said justice of such offence, and upon such conviction "shall forfeit for every hare, &c. *(a)*" shall be understood, *upon proof made*, that it was *found upon him*;—otherwise that there could be no conviction.

A person cannot be convicted without proof. S. C. ante, 40. 10. Mod. 26. Comy. 274. 522. 576. Ld. Ray. 1220. 1368. 1478. Stra. 496. 711. 1098.

(*a*) See 9 *Anne*, c. 25. and 28. *Geo.* 2. c. 12.

Memorandum. Case 68.

IT was said by POWYS, *Serjeant*, in chancery, that if a bishop make a lease for twenty-one years, and the lessee create *a trust* thereupon, and after the bishop die, and his successor, suppose for a fine, renews the lease, though not compellable to do it, and though there be no trust of the second lease, yet equity shall subject it to the former trust.

Bishop's lease renewed, subjected to a former trust.

Abr. Eq. 272, 273 326. Gilb. Eq. Rep. 77. Prec. Ch. 319. 3. Peer. Wms. 101.

Lesauld *against* Dyer. Case 69.

BY THE COURT and all THE CLERKS. The meaning of the rule, that "after a cause has slept four Terms after issue joined, "there must be a Term's notice of trial," is, that there shall be some actual proceeding within the four Terms; for a proceeding actually out of the four Terms, though, by acceptation of law, it may be within the four Terms, is not enough: as if a *venire facias* be taken out in the Vacation after the fourth Term, tested, as it must be, in Term, so that in consideration of law it is of that Term; yet because in fact it was after, it is no such proceeding as to bring the party out of the necessity of giving a Term's notice.

The rule, that a Term's notice of trial after a cause has slept four Terms, explained.

S. C. 2. Salk. 457. 650. Ante, 18. 5. Com. Dig. "Pleader" (R. 17.).

* GOULD, *Justice*, cited the case of *Cox v. Hare*, in *Easter Term*, in the tenth year of *William the Third*, that if the cause had any agitation within the four Terms, as striking a jury, or any motion in the cause, it would be a sufficient proceeding. *[58]

LESAULD *against* DYER.

And PER OMNES CLERICOS, notice any time, *sedente Cur.* within the last day of the last of four Terms, is sufficient; for that shews the matter has not slept four whole Terms, and the Term of which the issue is joined is to be taken exclusively; for the rule is, that proceeding be within four Terms after issue joined: So that if issue be joined in *Trinity Term*, and there is any proceeding or notice before the end of next *Trinity Term*, it will be enough.

And here it appeared by the indorsement on the back of the *venire facias* that it was taken out in Vacation. And for want of compliance with the rule the verdict was set aside.

Case 70.

The Queen *against* Hoskin.

" Servant to " *J. S.*" is a good addition.

A SERVANT was indicted for a trespass committed by him by the command of his *master*, by the name of " *A. B.* servant " to *J. S.*"

S. C. Holt, 41. 8. Mod. 51. Stra. 556. 816. Ld. Ray. 264. 849. 1179.

Exception was taken, that there was no addition, " servant" being not good.

But by HOLT, *Chief Justice*, " servant to *J. S.*" is a good addition, and as certain as " gentleman *(a)*."

Exception to the caption in same Term.

And he said, there could be no other exception to the caption the same Term it comes in.

And no more was done.

(*a*) See Year-Books 2. *Hen.* 6. pl. 31. 9. *Edw.* 4. pl. 48 2. *Hen.* 4 pl. 7.; the 21. *Edw.* 4 pl. 71.; and Bro. Abr. " Additions," 56. 58. *accord.*—But see 2. Hawk. P. C. c. 23. s. 112. *contra.*

Case 71.

Claxton *against* Bassy.

Pleas in bar need only be certain to a *common intent*. Post. 156.

THE statute 8. & 9. *Will.* 3. c. 18. of Composition of two-thirds was pleaded in bar, and it was averred, that the defendant had absconded at such a time before the statute; but it was not said, that he had absconded, or was in jail at the time mentioned in the statute.

S. C. Ld. Ray 967. Com. Rep. 112. Ld. Ray. 324. 382. 390. 763. 1536.

THE EXCEPTION taken was, that for aught appeared in this plea the defendant was solvent at the time of the statute, and therefore not capable of the benefit thereof.

But PER CURIAM, This being *a bar* shall be good to a *common intent*; and if the defendant became solvent after the failure, it ought to come on the plaintiff's side by replication.

A *profert* not necessary in pleading *a writing*, though under *seal*, unless delivered as *a deed*.

SECOND EXCEPTION. That the defendant pleaded the composition as a writing under hand and seal; and therefore *a deed*, and by consequence to be produced with a *profert*.

But PER CURIAM, He only pleads it *signed* and *sealed*, but not to have been *delivered* as a deed must have been: and the

5. Com Dig. " Pleader" (2 G 6.).

statute

statute does not require delivery, and therefore there is no necessity of a *profert*. CLAXTON *against* BASTY.

THIRD EXCEPTION. It is pleaded to have been made the twelfth of *February*, after the statute; so it may have included debts becoming due after the statute.

A plea of *composition* shall only be understood of debts within the statute.

But PER CURIAM, It shall only be a composition for the debts understood by the statute, at least as to the non-subscribers, though it may be otherwise to subscribers.

And judgment *nisi* was given for the defendant.

* [59]

* Lord Mohun's Case.

Case 72.

CHARLES GERRARD, son to the *Lord Brandon Gerrard*, was attainted of HIGH TREASON in the second year of *King James the Second*, for treason committed against *King Charles the Second*, and obtained his pardon, and leave to reverse his attainder.

If a *father* bring a writ of error to reverse the attainder of his *son*, and, on the confession of the attorney general, a rule for its reversal be obtained, the Court, though in the reign of a subsequent king, will order the record of the reversal to be made up after the death of the parties; but the writ of error, and the assignment of error thereon, must be produced.

Accordingly he brought *a writ of error*, and assigned error, which the then ATTORNEY GENERAL confessed, and obtained a rule, upon his own motion, for reversal of the attainder; but the record of the reversal was never made up.

The *Lord Brandon Gerrard* died, and *Charles Gerrard* succeeded him in honour and estate, and sat many years in THE HOUSE OF LORDS, before the death of his father, and after the reversal in THE HOUSE OF COMMONS, as a person duly qualified. He was afterwards by *King William* made *Lord Macclesfield*; and by his will devised his estate to my *Lord Mohun*, and made him his executor, though he had several daughters that were heirs at law.

Upon this the daughters, finding that there was no ROLL of the reversal of the attainder, suggested that matter by PETITION to the queen, and implored her grace. The queen referred the matter to the examination of the attorney general and solicitor: whereupon MR. SOLICITOR, in the *Trinity Term* before, moved for a rule for staying of all things as they were until the Court was further moved, and had such a rule.

3. Chan. Rep. 102.

It was NOW moved for my *Lord Mohun*, that he might make up the record.

And, it appearing upon examination that there was no writ of error, or assignment of error, that his Counsel would own or produce,

5. Com. Dig. "Pleader" (M. 4.).

THE COURT unanimously declared, that the first rule was a very reasonable good rule, and chid some of the Counsel that called it an extraordinary one. They said, they would ever make such a rule upon the like occasion; and that it is frequently done between party and party; that if there be a rule for a judgment, and it is not entered for many years, if the Court be informed of it, they will not let them enter it until the matter be examined how it came not to be entered before.

SECONDLY,

LORD MOHUN'S CASE.

SECONDLY, They said, they would supply the neglect or defect of their officer, that subjects should not suffer by it, and therefore would give leave to make up THE ROLL now.

Vide post. 191.

THIRDLY, That they could not make up a record of a reversal of an attainder without a warrant, viz. *First*, A writ of error; *Secondly*, An assignment of error: for the writ of error being brought in the king's bench, *viz.* the same court where the attainder was, no error could be assigned there but error in fact; and it may be the errors assigned were errors in law; and this ought to appear to us, that we may not order a wrong record to be made up.

Vide. 2. Lev. 38.

And at another day, perceiving THE COURT would not suffer THE ROLL to be made up without *a writ of error*, they produced a writ, which was of a judgment of attainder for treason committed in *King James the Second's* time, whereas it should have been, as the truth was, in *King Charles the Second's* time: and the errors assigned were * both in fact and in law: in fact, that two of the jury never appeared: in law, that the *venire facias* was *qui tam*, whereas it was in the king's case.

*[60]

And now they moved for leave to make an entry.

NORTHEY, *Attorney General*, *contra*. It appears that their writ of error is not to reverse this attainder, and therefore you will not now suffer them to enter up a judgment of reversal, when it appears that the writ, which is the foundation, is wrong, and cannot be an authority to reverse the attainder, for it is not *ad idem*. If judgment be entered now, it becomes your judgment; and therefore you ought to examine the foundation of it, and not give order for the entering of a judgment only to put the matter in brangle. Besides, when there is a rule for judgment, and that is not entered for some time, you take care for the safety of purchasors, to have it entered of that time that it is really given of. And by the act of the *Civil List*, this estate is unalienably fixed in the queen, and would by the relation of this entry be devested out of her.

THE COURT. The whole question will be, Whether we shall now command our officer to do that which he ought to have done long before? It is said, that in the case of a *common recovery*, after the death of the parties, the right *original* not having been filed, but found in the attorney's study, was ordered to be entered up; and as to the matter of purchasors, there are, in all probability, many in this case under my *Lord Macclesfield*, which it would be hard to defeat.

The doubt at last came to be, Whether they would leave my *Lord Mohun* loose of the rule, to do what he could according to law, or hold him to particular directions from the Court? for the Court said, that if he should make any entry but what should be well warranted, the Court would punish the clerk that should do it, and also set it aside.

And at last IT WAS RULED, that they should make a draught in paper of the record that they would make up, and attend THE JUDGES and MR. ATTORNEY with it. LORD MOHUN'S CASE.

And the writ of error, such as it was, was entered on THE ROLL with a *valeat quantum valere potest*, PER CUR.

But THE COURT would not make a rule in it to make it their judgment, but only that their officer should make that entry now which he should have made when the rule was pronounced.

Burridge *against* Fortescue. Case 73.

Of staying proceedings upon payment of principal, &c.

PER CURIAM. In debt upon a judgment the Court will not stay proceedings on motion upon payment of principal, interest, and costs, as they will upon debt on bond; and in that case it is an equitable motion to be relieved against the penalty; and therefore whatever costs the plaintiff has been in any wise put to, shall be allowed him (*a*).

(*a*) See the Queen *v.* Foxley, ante, 11.; Butler *v.* Rolfe, ante, 25.; Le Sage *v.* Pere, 7. Mod. 114.; Anonymous, 7. Mod. 140.; and the statute 4. & 5. *Ann*, c. 16.

* Evans *against* Roberts. Case 74.

If a declaration in an inferior court alledge it to be a court *secundum legem mercatoriam*, without shewing it *curiæ stapulæ*, it shall be intended a common inferior court.

A WRIT OF ERROR on a judgment upon a bond, before the sheriff and bailiff of *Bristol*, in a court held before them, "*secundum legem mercatoriam, secundum consuetudinem civitatis* "*præd. tempore cujus, &c.*"

EYRE excepted,

FIRST, That there is no court held *per legem mercatoriam* before the sheriff, for that must be only held before the mayor of the staple, and in matters only concerning *staple* transactions.

But PER CURIAM, It being laid to be *secundum consuetudinem civitatis*, it will be well enough, like the case of *Hodges v. Serwin* (*a*), where a court of pypowders, which only is intended of courts for fairs and markets during the fair or market, and for matters there arising, is said to be held at *Gloucester*, *secundum consuetudinem civit. præd.* and action for a hundred pounds therein; and held good, because of *consuetud. &c.* (*b*); for it being laid to be an ancient court, it shall be intended a common inferior court, for common matters conusable there.

S. C. 3. Salk. 146. 12. Mod. 598. Ld. Ray. 1543. 1. Salk. 265. 5. Com. Dig. "Pleader" (3. B. 13.).

A writ of error denied to the judge of an inferior court, to remove a record *coram vobis*, without naming him, is good, although the record was before his predecessor.

THE SECOND EXCEPTION was to the writ, for it was to remove *recordum loquelæ quæ coram vobis residet*, and it appears that the record removed was before his predecessor.

(*a*) Cro. Car. 46.
(*b*) Vide Saund. 87. 312.
(*c*) 1. Sid. 64. 1. Keb. 165. 187.

And

EVANS *against* ROBERTS.

And THE COURT ſaid, that the writ being directed to the ſheriff, without naming him, it is well enough; and if a writ be directed to the ſheriff of *B.* and before its return another ſheriff is choſe, he ought to return and execute the writ; and the difference is when it is directed to him by name, and when by the name of his office generally; and this is not like a writ of error from the common pleas, for that is always to THE CHIEF JUSTICE by his name *(a)*, if there be a Chief Juſtice, or to the others by name, and therefore muſt not vary.

Return to a writ of error.

6. Com. Dig. "Return" (D. 4.).

NOTE, Here the anſwer to the writ of error was, that there came another writ of error to them before that writ, bearing the ſame *teſte* and return, and recited the writ, and made a return to it; and held good.

And the judgment was affirmed.

(*a*) 1. Sid. 64. 1. Keb. 165. 187.

Caſe 75.

The Queen *againſt* Dixon.

A *certiorari* to remove an indictment for a miſdemeanor from the quarter ſeſſions, taken out before, but not ſerved till after conviction, ſhall be quaſhed.

S. C. 1. Salk. 150.
S. C. 3. Salk. 78.
S. C. 2. Ld. Ray. 971.
Ante, 17. 42.
Poſt. 105. 311.
1. Salk. 379.
Ld. Ray. 1118.

DIXON was indicted for ſelling five yards of muſlin, and affirming it to be worth four ſhillings a-yard, when in fact it was really worth but two ſhillings and ſixpence a-yard.

A writ of *certiorari* was brought to remove it, but not ſerved till after conviction.

And though THE COURT had no opinion of the indictment *(a)*, yet they ſaid they did not like *certiorari's* after verdict, and that whenever one removes an indictment on which there is a conviction *(b)*, the *certiorari* ought to give day above, which was not done here, therefore it was altogether irregular, and that by this *certiorari* they could by no means remove the indictment; for if one take out a *certiorari* to remove an indictment, and will not uſe it until after conviction, or the jury be ſworn, he loſes the benefit of it.

* [62]

Vide ante, 17. 33. 40. 43. Poſt. 83.

* And for that the writ was quaſhed, and a new one granted to remove the indictment and conviction thereupon, and ordered them to make it ſpecial, and give the proſecutor day thereupon above.

(*a*) See the Queen *v.* Orbel, ante, 42.; Anonymous, poſt. 105.; the Queen *v.* Hannon, poſt. 311 — By 33. *Hen.* 8. c. 1. to obtain money, &c. by means of a *falſe privy token*, or, by 30. *Geo* 2. c. 24. by means of *falſe pretences*, is made an indictable offence; but, by this laſt ſtatute, the *certiorari* to remove indictments founded thereon is expreſsly taken away, Rex *v.* Smith, Cowp. 24.; Rex *v.* Young, 2. Term Rep. 472.

(*b*) But ſee Rex *v.* Nicolls, that an indictment cannot be removed from ſeſſions after verdict and before judgment; and that if a *certiorari* have been obtained for that purpoſe it ſhall be quaſhed, 2. Stra. 1227.

Mills.

Mills *against* Wilkins. Case 76.

Hilary Term, 13. Will. 3. Roll .

AND

Michaelmas Term, 2. Anne, Roll .

TRESPASS for taking several skins from the plaintiff. The defendant justified as an officer by virtue of the statute of 1. *Jac.* 1. c. 22. for well tanning of leather, setting forth the title thereof variant from the record; and averred, that the skins were not dressed according to the intent and meaning of the statute, without shewing any particular defect.

The mis-recital of the *title* of a statute is immaterial; for the title is no part of the statute.

S. C. 2. Salk. 609.
S. C. 3. Salk. 331.
S. C. Holt, 662.
Hob. 310.
11. Co. 33.
Hut. 56.
4. Inst. 345.
Ld. Ray. 77. 120. 343. 382.
2. Vern. 58
1. Peer. Wms. 317.
3. Peer. Wms. 434.
2. Hawk. P. C. ch. 25. s. 105.

Two exceptions were taken to the plea:

First, That there is no such act intitled as they set forth; and though it be unnecessary for them to set forth the title of the act, or to recite it particularly, yet since they have taken upon themselves to do it, they must do it truly at their peril; for by their particular description of the act they tie up their justification to the statute they describe *(a)*.

To this exception it was offered for answer, that the title is no part of the act, and that an act may be without any title at all, as most of the ancient acts are; and therefore a variance in the title is nothing; and for this was quoted the saying of my Lord Hale, in *Hardres (b)*, and an opinion of the whole Court in common pleas, in the case of *Chance v. Adams* (*c*), grounded upon that of Hale.

Holt, *Chief Justice*. It is true, the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is part of the book; for the title is not the law, but the name or description given to it by the makers: just as the preamble of a statute is no part thereof, but contains generally the motives or inducements thereof; and therefore it is not necessary to set forth the title or preamble, but generally "that at a parliament sessions "held such a time, &c. *it was enacted*;" though some have been so over-cautious, as not only to set forth the title of the act, but also * to do it in *English*: but sure that is too much caution; and the true way to set it out, if at all, is in *Latin* (*d*); and by setting out the title specially, you tie your justification to an act so entitled, and if you cannot produce one you are gone: and he said, the saying of Hale was sudden (if at all), and notwithstanding his great veneration for his opinion, he could not agree with him.

* [63]

3. Keb. 641, 642. 648.
Dyer, 324.
Vide postea.

Gould, *Justice*, agreed with the Chief Justice;

Powell, *Justice*, only declaring, that he had concurred with the rest in the common pleas solely upon the opinion of Hale, reported in *Hardres*.

(*a*) 3. Keb. 641. 648. Cro. Car. 232.
(*b*) Hard. 324. 3. Cro. 86. Staund. 128.
(*c*) Hilary Term, 7. Will. 3. Roll 868.

(*d*)

And

MILNE *against* WILKINS.

And upon this exception the plaintiff had judgment.

A SECOND EXCEPTION taken was, that they did not ſhew wherein the defect was, that the Court might judge whether it were contrary to the act or not.

And to this it was anſwered, that the ſeizure was not as an abſolute forfeiture, but to try the ſufficiency; and it would be hard to put an officer at his peril in ſuch a caſe to know and to ſet forth the defect.

Caſe 77. Cotton *againſt* Martin.

A priſoner for debt, who eſcapes, and is recommitted on 1. *Anne*, c. 6. cannot have *a day rule*; and a perſon in cuſtody at his ſuit ſhall be diſcharged on *oath* that nothing is due. Ante, 21. 37. Poſt. 95. 125. 154. 183. 225. 253.

DEBT UPON A BOND to come to an account.

The plaintiff had been priſoner in THE FLEET, and having eſcaped was taken up by a warrant according to the late act of parliament (*a*), and committed to NEWGATE. And an affidavit being made that nothing was due (*b*), and the plaintiff, by his being in NEWGATE, being diſabled from coming before a Judge to ſhew cauſe of action, and that diſability coming from his own wrong, *viz.* the eſcape;

THE COURT ordered *common bail*: if he had not been eſcaped, he might have got out by *a day-rule*.

(*a*) 1 *Anne*, c. 6.

(*b*) But ſee the caſe of Emerſon *v.* Hawkins and Others, 1. Wilſ. 335. that where a plaintiff has ſworn poſitively that the defendant is indebted to him, in order to hold him to bail, the Court will not receive any affidavit to explain or contradict the plaintiff's oath; and that even an affidavit of the plaintiff's confeſſion that the defendant owes him nothing cannot be received, S. C. Sayer, 54. See alſo 1. Salk. 100 2. Stra 1157 1. Bl. Rep. 192. 1. Burr. 645. 4. Burr. 2017. Dougl. 432. 450. 1. Term Rep. 716. *accord.* But if the plaintiff's affidavit be defective, the Court will diſcharge on common bail, Huſſey *v.* Baſkerville, 2. Wilſ. 225.

Caſe 78. Smartle *againſt* Penhallow.

Trinity Term, 2. Anne, Roll .

If the cuſtom of a manor be, that the lord may grant copyhold eſtates "to three "perſons, *habendum* to "them ſucceſ- "ſively, as they "ſhall be nam- "ed, and not "otherwiſe," A SURRENDER to *A.* for his own life, and for the lives of *B.* and *C.* is warranted by the cuſtom.—S. C. 1. Salk. 188. S. C. 3. Salk. 181. S. C. Holt, 165. S. C. 2. Ld. Ray. 994. 1. Mod 102. Co. Lit. 58. 4. Co. 23. Poph. 35. Ld. Ray. 132. 3. Peer. Wms. 781. 3. Com. Dig. "Copyhold" (C. 3.). (C. 8.). (C. 10.). 1. Bac. Abr. 458.

UPON a ſpecial verdict the caſe was this: The cuſtom of the manor of *Tregueir* in *Cornwall* was found to be, that every cuſtomary copyhold of that manor might be granted to three perſons, *habendum* to them ſucceſſively, *ſicut nominantur, et non aliter*; and that on the death of every tenant the lord ſhould have his beſt beaſt for *a heriot*: and a ſurrender is found to have been to *T. N.* and his aſſigns, for his own life and the lives of two others.

The queſtion was, Whether this ſurrender were warranted by the cuſtom?—FIRST, For the whole; that is, for three lives.—And, SECONDLY, In caſe it be not good for three lives, Whether it be good for his own life?

In the argument of this cafe it was agreed, that a leffee for years of a manor may grant a copyhold eftate in fee, and fo for life or lives, and the grant fhall be good againft him that has the inheritance. But it was urged, that if by making a lefs grant than the cuftom warrants the tenure fhould be altered, or any damnification of the fervice occafioned, fuch grant of a leffer eftate than the cuftom warrants would be void, and a prejudice would * enfue to the lord by this grant; for now it would be an eftate for *auter vie* of which there might be an *occupant (a)*; and then the lord would have a tenant whom he knows nothing of, and *occupancy* may be of *a copyhold* as well as *poffeffio fratris*. It is true, a copyhold eftate fhall not have all the qualities of an eftate at common law, as tenancy by the curtefy and dower, but thefe are excrefcent interefts; and though the cafe of *Ven v. Howell (b)* be againft this, yet it feems that the reafon of the prejudice which would enfue to the lord is fufficient to overthrow that; and if it cannot be good in all, it is more confonant to law to make it void for the whole than to let it ftand in part and avoid it for the reft; for the cuftom is in the nature of a power, which muft be ftrictly purfued: as if a tenant for life by a fettlement have power to make leafes for twenty-one years, and he makes a leafe for thirty years, it is void even for the twenty-one years: fo if there can be occupants, it cannot be good becaufe of the prejudice to the lord; if there cannot be occupancy, it cannot be made good to his affigns, becaufe not purfuant to the cuftom; and then it cannot be good for the firft life, becaufe lefs than the cuftom (which is in nature of *an authority)* warrants.

SMARTLE againft PENHALLOW.

* [64]

6. Co. 37. Vaugh. 187. to 205. 2. Bulft 11, 12, 13. Cro. El. 58. 72 b. Poft. 68. Carth. 427.

Again: Suppofe it might be good for the life of *T.N.* yet the jury not having found him alive, it fhall not be intended: ... if tenant for years or for *auter vie* bring an ejectment, he muft aver the term or the life of *ceftui que vie* to continue: and fo here the jury ought to have found it, efpecially when they have not concluded upon a fpecial point, in which cafe the Court fhall only confider what the jury have made a doubt of, and all other things fhall be intended; according to *Cro. Jac.* 622. and 6. *Co. Goodale's Cafe.*

Befides, if this were conftrued a good grant within the cuftom, the lord would lofe his heriot; for the payment of that fervice is confined to fuch grant as is precifely warranted by the cuftom, *viz.* a grant to "three for lives *fi,ut nominantur*;" and this is no fuch grant, therefore no heriot; therefore it would be a prejudice to the lord, and by confequence the grant is not good; and it will not be an anfwer to fay that *heriot fervice* is an accidental fervice; for the ftatute (*c*) upon which thofe cafes of *Haugh v. Hayns (d)*, and *Dean of Worcefter's Cafe (e)* go, that orders the ufual rents to be referved, takes no notice of heriot, becaufe it is an accidental fervice; but here the cuftom fpecially mentions a heriot to be part

2. Saund. 166, 167.

(*a*) See 29. *Car.* 2. c. 3. and 14. *Geo* c. 20.

(*b*) 1. Roll. Abr. 511.

(*c*) 13 *Eliz.* c. 10.

(*d*) Cro. Jac 76.

(*e*) 6. Co. 37.

of

SMARTLE against PENHALLOW.

of that service, and therefore it ought to receive the same construction that those cases would in case the statute had mentioned heriot.

At another day, in *Michaelmas Term*, for it was spoke to first in *Trinity Term*,

HOOPER, *Serjeant*, argued on the same side; and urged, that this could not be a grant within the custom, for that is of a grant to three, *habendum sicut nominantur successivè*; and the grant here is only to *T. N.* for the life of two more and himself; so it is no grant at all to the two *cestui que vie's*, nor is *T. N.* the first life mentioned. * And as to the objection of *qui potest plus potest minus*, if a man may grant in fee by custom he may grant for three lives, it is true with some distinctions; if a man have power to grant in fee, reserving rent, he cannot grant for life without reservation.

Ante, 19, 20.

*[65]

SECONDLY, The estate granted must not only be less in judgment of law, but also in value; for if a man have power to let for three lives, and he lets for a hundred years, that indeed is less in judgment of law, but because it is not less in value the grant is void. All authorities, whether created by act of parliament or by the party, as in settlements, or by custom, as here, are still but authorities, and therefore not to be varied from; and he quoted *Whitlock's Case* (a), and the difference there, and put cases upon the statute that enables bishops to make leases: If a bishop who by the act may make a lease for twenty-one years make it for twenty-two years, it is void for all; and if a man make a lease by parol for four years, it shall not be good for three upon the statute 29. *Car.* 2. c. 3. of Frauds and Perjuries: but he insisted chiefly upon an inconveniency that would ensue in this case; for if *T. N.* were a trader, and committed *bankruptcy*, this estate for three lives would be granted to an assignee, and then it would be quite out of the custom; for then the assignee would hold it after the death of *T. N.* during the other two lives, and the lord would lose his heriot.

WILLIAMS *contra*. We are upon the construction of a grant to an honest purchaser for a valuable consideration.—This will be good, if not to him for his and two other lives, at least for his own life; and that will do as well for us. The substance of the custom is, to make a grant for three lives; that is, the quantity of the estate; but whether it be to one person for three lives, or to three for their lives, is only accidental and a quality; and the quantity or continuance of the estate is what is only material. The meaning and drift of the custom is to hinder any longer incumbrance upon the land than for three lives, but not whether the lives named, or others, are to enjoy it; and since, by the custom, it may be to three for their lives, *à fortiori* it may be to three for the lives of three others, for that is a less estate; and that which we contend for is less than

(a) 8. Co. 69. 1. Brownl. 196.

that

that again; and if the first grant had been strictly pursuant to the letter of the custom, as found, sure it cannot be denied but that the several grantees might grant each his own estate, and the lord be compelled to admit each surrenderer; or that they might all grant their estates to one person, who then would have the same estate as we now contend for. And if so, why may it not be at the first? For it would be against all reason, that the grantees who claim under the lord should do it, and not the lord himself: and he relied upon the case of *Ven v. Howell* (*a*) as full in point; for the reason given there rules this, *viz.* that it can be no inconveniency, but rather a conveniency to the lord; for since there can be no occupancy of a copyhold estate, it would be more advantageous to the lord to have such a grant as this than to have it to the three persons named for their lives; for upon the death of the tenant who takes for his own life and * two more, the estate would come to him again, whereas in the other case it would go to the next in remainder: and there is a known diversity between the lord pursuing *a custom* and one acting by *a bare authority*; the one has *authority* and an *interest*, and therefore may do less; the other has a *bare authority* without any interest, and for that reason cannot vary from it (*b*). But suppose this point were against me, at least it will be good to *T. N.* for his own life, for that is less than for his own and two lives more (*c*). If by custom the lord may grant for life, he may grant *durante viduitate*, though such a grant were never made before; yet because, at most, it can go no farther than the custom warrants, and that possibly it may determine sooner, it is good: So far of the grant as goes to him for life is good; and if the words "and for the lives of *A.* and *B.*" be repugnant or void, let them be rejected, for a void clause will be the same as if it were not in at all. *Hobart* (*d*) makes a difference, that where a tenant for years grants all his estate *habendum* after his death, the grant is good and the *habendum* void; but that where all is one entire sentence, as if he had granted his estate after his death, the grant is all void: and some books make the difference where an implied estate is granted in the premises, for that may be avoided by an *habendum*, but otherwise of an express estate: as if a feoffment be "to *A. habendum* "to him and his heirs after the death of *B*" the whole is void by the *habendum*; and it may be reason, that where an *habendum* may encrease an estate it may likewise avoid it if it be against law; but here the *habendum* cannot encrease it, for it can make it but for life, and therefore cannot destroy it. There can be no occupant of a copyhold estate for two reasons: THE FIRST, Because there cannot be a tenant of a copyhold, but by surrender and admittance. SECONDLY, The statute concerning special occupants (*e*) does not extend to it, because there were no occupants could be before (*f*), and that the making it now would turn to the prejudice

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* [66]

See 6. Co. 37. cont. 1. Sid. 136.

(*a*) 1. Roll. Abr. 511.
(*b*) Co. Lit. 52.
(*c*) 4. Co. 29.
(*d*) Hob. 171.
(*e*) See 29. *Car.* 2. c. 3. and 14. *Geo.* 2. c. 20.

(*f*) Adjudged in the court of common pleas, that the statute extends to things that lie in grant; and of them there could be no occupancy; *ergo quære de hoc.*—NOTE *to the former editions.*

SMARTLE *against* PENHALLOW. of the lord; and the general words of an act shall not be extended to a copyhold estate, if it may prejudice the lord.

1. Vern. 234. 2. Vern. 265. 8. Mod. 352. 12. Mod. 123. As to the objection, that the verdict does not find the life of *T. N.* to continue, I answer, that shall be supposed to continue until the contrary appear: and he quoted some cases, that where one, having a bare power, exceeded that power, it shall be good for what is within the power, and void for the rest *(a)*. If there be a letter of attorney to deliver seisin to *A.* and he deliver it to *A.* and *B.* it is good to *A.* and void to *B.* though the making of livery is as entire an act as the limiting an estate can be *(b)*.

HOLT, *Chief Justice*, and THE COURT. If the custom be to grant a copyhold estate for three lives, the lord in fee of the manor cannot exceed that, and a lord at will of it may go so far; for it is not material what estate the lord has in the manor: and sure he who may grant for three lives may grant for one life; as if the custom be, that he may grant a copyhold in fee *solummodo*, yet he may
[67] grant in tail, for life, or for years, * and here the three lives are only the extent of the custom, but not to bind a man to the formality of an estate for three lives. The custom in this case consists of three parts:—FIRST, The constitution or creation of the estate, *viz.* that it be by copy.—SECONDLY, The extent of it, that it shall not exceed three lives.—THIRDLY, The manner of granting it, that if it be to three, they shall not take jointly and *in præsenti*, according to the course of the common law, but that the first named shall take all for his life, and the second all for his life, and
4. Co. 23. a. 30. a. Godb. 20. 1. Leon. 56. Cro. El. 323. 373. Mod. 627. 1. Roll. Ab. 511. L. so of the third. If the custom then enable him to let for three lives, it will enable him to do it for one; as if the custom were to grant in fee, he might lease for life, remainder for life, or in tail, remainder in fee; for the custom is not to grant one entire estate in fee: if the custom be to grant for life, he may grant *durante viduitate*, though that be another limitation than for life: and generally where the custom is to grant to three for their lives, *habendum successivè sicut nominantur*, there likewise the custom is, that the tenant in possession may by the surrender of his estate defeat the remainders.

And HOLT, *Chief Justice*, put a late case in this court, where upon a special verdict this custom was found, and the first of the three purchased the manor; and the question was, Whether, inasmuch as he had a power to frustrate the two remainders by surrender, he, by his purchase of the manor, had extinguished them? And there it was held to be no merger or extinguishment of the estate, because the custom of destroying the remainders is confined to the formality of the surrender; and the purchase of the manor, though it be, between the parties, a surrender, yet it shall not be construed as such to other purposes, *viz.* to destroy the remainders; and if the grant had been only to *T. N.* in this case for his own life, that had been good; and if he had granted it to another grantee, he would have been tenant *pur auter vie*; and why may not that be by

(*a*) Co. Lit. 52. 258. (*b*) Perkins, 189.

the

the first grant as well as by mesne grants? I cannot tell; for this is no estate capable of occupancy; and if the first of the three commit a forfeiture, he in remainder shall not enter, but the lord shall enter, and hold it during the life of such first tenant. SMARTLE against PENHALLOW.

As to the objection, that the heriot would be lost, that is not so; for the lord would have a heriot upon the death of every tenant, and upon the death of *T. N.* here, and he is the only tenant; and though he has none on the deaths of the *cestuy que vies*, it is because they are not tenants.

As to the objection, that the jury does not find the life of *T. N.*; it would be necessary to aver it in pleading, but not in a verdict; and we shall not intend him dead, especially when the plaintiff makes title against him, and therefore ought to alledge his death, if the truth be so.

* But suppose *T. N.* had become *a bankrupt*, and this estate been assigned. I answer, Suppose it were to three *sicut nominantur successivè*, and the tenant in possession become *a bankrupt*, shall not the case be the same? for the assignee shall be tenant *pur auter vie*. And the objection will be the same; for this is a consequence upon the interpretation of the act of parliament, and shall not at all prejudice the lord; for if the assignee die during the life of the copyholder bankrupt, there will be a case out of the custom by the transmutation of the tenant by the act of parliament, and yet the lord shall have his heriot; for it never was the intent of the statute to put the assignee in a better condition than his principal, whose estate he has, would have been in, nor to work an alteration of tenement to the prejudice of the lord: this is supposing that the copyholder surviving should not have it back again; and if he shall have it again upon the death of the assignee during his life, then the lord, by original custom, ought to have a heriot, and a subsequent act of bankruptcy shall not defeat him of it; and if the copyholder had died, living the assignee, and thereby his interest determined, as some thought it would, Who should pay the heriot? * [68]

But upon this point they seemed cautious of delivering any opinion, but reserved themselves until that matter should come to be a question, for they said it was worth consideration. Q.

POWELL, *Justice*, seemed to incline, that if the assignee had died, living the copyholder, the lord would immediately have the land; for the whole interest of the copyholder was vested in him by the statute.

And POWYS, *Justice*, thought, that upon the death of the copyholder the estate of the assignee would determine, though the *cestuy que vies* were living.

1. Roll Abr. 504. Cro. Car. 204. Jones, 220. 3. Com. Dig. "Copyhold". (F 14).

Here IT WAS AGREED, that if a grant be made to *A.* for the lives of *B. C. D.* and *A.* dies, the lord should have the land again, though against his own limitation, because there can be no occupant of a copyhold estate without a special custom; and this would be

SMARTLE *against* PENHALLOW.

be no miſchief, becauſe the failure would be on the ſide of the grantee only; for if rent be granted to one for three lives, and he die without diſpoſition, living *ceſtuy que vies*, yet the grantor ſhall hold the land diſcharged, becauſe occupancy cannot be of a rent, for that only can be of lands which paſs by livery, whereby the freehold paſſes, and ſhall not revert again until the limitation be determined, and it is for the ſake of *a præcipe* of a ſtranger.

And PER TOTAM CURIAM the grant was held good.—And the ſame objection of *bankruptcy* might be made in the caſe of *Ven v. Howel* (*a*).

(*a*) 1. Roll. Abr. 511. Ante, 64.

MICHAELMAS

MICHAELMAS TERM,

The Second Year of Queen Anne,

AT

The Sittings at THE GUILDHALL in London,

BEFORE

Sir John Holt, *Knt.* *Chief Justice*

OF

THE COURT OF QUEEN'S BENCH.

Leonard *against* Stacy.

Case 79.

THE case was: *A cheat* bought a quantity of goods from the defendant upon credit, and sold them to the plaintiff. The defendant discovering that he was catched, and that the goods were come to the plaintiff's warehouse, takes out *a replevin* out of THE SHERIFF'S COURT in *London*, and with several others takes the * goods again. And for this the plaintiff brought trespass.

If *A* defraud *B.* of goods, and sell them to *C.* and *B.* after notice that *C.* claims property therein, replevy them, *C.* may bring *trespass* for the taking.

S. C post. 139. S. C. Holt, 143. Post. 81. 103. 1. Salk. 5. 94. 2. Lev. 92. 1. Vent. 127. Ld. Ray. 984. 6. Com. Dig. "Trespass" (C. 2.).

HOLT, *Chief Justice*, said in this case,

FIRST, That in *replevin*, if property be claimed, and notwithstanding the party replevies, *trespass* will lie, and the claim or notice of property shall be the sole issue.

In *trespass* for making *replevin* after notice of a claim of property, the notice only is an issue. Post. 81. 103.—1. Salk. 5. 94. 2. Lev. 92. 1. Vent. 127.

SECONDLY, If several persons are declared against, and some under a *simul cum*, to take off the evidence of those that come under the *simul cum* something must be proved against them, and likewise endeavours used to take them, as process taken out against them, &c.

Defendants under a *simul cum* may be witnesses, unless there is evidence against them.

THIRDLY, If trespass be against two or more, and one *demur*, and another *plead to issue*, the damages assessed upon *the issue* shall affect him that demurred, if the demurrer be ruled against him: so

Damages where one pleads to *issue* and another *demurs*.

LEONARD *againſt* STACY.

ſo if treſpaſs be for breaking a houſe, and entering into a cloſe, againſt one who pleads *not guilty* as to one, and *demurs* to the other, there the jury muſt find damages ſeverally for the *not guilty*, and conditionally upon the *demurrer*: ſo if there be two defendants, and they vary their pleas as to the parcels in the declaration.

Perſons concerned only as appraiſers in a wrongful replevin are treſpaſſers.

Some of the defendants here would give evidence, that they were no farther concerned than as *appraiſers* to appraiſe the goods.

HOLT, *Chief Juſtice*, anſwered, that there could be no appraiſement in *replevin*; and if there could, the taking here being *tortious*, he, being there all the while, would be guilty of it.

A *licence* muſt be pleaded. Poſt. 171. Cro. Jac. 377. 204. 5. Com. Dig. "Pleader" (3. M. 35.); and ſee the caſe of Bennett *v.* Allcott, 2. Term Rep. 166. *accord.*

Beſides, if the law give a man *a licence* for the doing a thing, in *treſpaſs* you muſt *plead it*, and not give it in evidence upon not guilty.

Caſe 80.

Barber *againſt* Dennis.

Trover lies by a *maſter* for ſeaman's tickets earned by his *apprentice*. S. C. 1. Salk. 68. Cro. Eliz. 638. 661. 746. 12. Mod. 415. Vezey, 83.

THE widow of a waterman, who, as was ſaid, by the uſage of WATERMAN'S HALL may take an apprentice, had her apprentice taken from her, and put on board a queen's ſhip, where he earned two *tickets*, which came to the defendant's hands, and for which the miſtreſs brought *trover*.

AND IT WAS AGREED, that the action would well lie if the apprentice were a legal apprentice, for his poſſeſſion would be that of his maſter, and whatever he earns ſhall go to his maſter.

Quære, If a *freeman* of the Watermen's Company is a *freeman* of *London*.

But it was objected, that THE COMPANY OF WATERMEN is a voluntary ſociety, and that being free of it does not make a man free of *London*: So that the cuſtom of *London* for perſons under one-and-twenty to bind themſelves apprentices does not extend to watermen; which was agreed by all.

Indentures of apprenticeſhip muſt be enrolled. 3. Lev. 389.

Then it was ſaid, that the ſuppoſed apprentice here was no legal apprentice, if the indentures be not enrolled purſuant to the act of parliament of 5. *Eliz.* c. 4. and if he were not a legal apprentice the plaintiff had no title.

But HOLT, *Chief Juſtice*, ſaid, he would underſtand him an apprentice or ſervant *de facto*, and that would ſuffice againſt them, being wrongdoers.

Anonymous.

Anonymous. Case 81.

IN another case, which was action of covenant against an apprentice for leaving his service, If a master may recal his licence to an apprentice, &c.

HOLT, *Chief Justice*, held these two points:

FIRST, * That if a master license his apprentice to leave him, he cannot after recal that licence. *[70]

SECONDLY, That if a master bring covenant for leaving his service at such a time, and the defendant justifies by virtue of *a licence* at that time, the master cannot upon that declaration give evidence of a leaving him at another time, for there *the time* is material, and is not like a transitory matter in trespass. In what case time is material. Post. 120. 2. Roll. Abr. 680 687. Cro. Car. 514. 5. Com. Dig. "Pleader" (S. 12.).

MICHAELMAS TERM,

The Second of Queen Anne,

IN

The Common Pleas.

Sir Thomas Trevor, *Knt. Chief Justice.*

Sir Edward Nevil, *Knt.*
Sir John Powell, *Knt.* } *Justices.*
Sir John Blencoe, *Knt.*

Edward Northey, *Esq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Brigs *against* Collingson. Case 82.

TRESPASS for breaking the plaintiff's house, and entering into it, and taking and carrying such and such goods to such and such a value.

In trespass for breaking and entering the plaintiff's house, and carrying away his goods, if the defendant plead *not guilty* as to the breaking, and justify the *entering*, by virtue of process from an inferior court, but say nothing as to the carrying away; *qu.* If good.
Co. Lit. 145.
3. Lev. 281.
10. Mod. 25.
Ld. Ray. 410. 465. 712. 902. 1054.
8. Mod. 120.
Stra. 637. 509. 820. 1184.

The defendant pleads *not guilty* as to the breaking of the house, and justifies *quoad* the entering, taking, and carrying away the goods; for that *K.* is an ancient borough, in which there is an ancient court to be held by virtue of letters patents, *et consuetudinem curiæ prad.* every three weeks on *Thursday*, and that it has conusance of all debts and actions arising within, &c. not exceeding forty pounds; that such a day and year *J. S.* did there levy a plaint for fifteen pounds against the plaintiff for a cause arising within their jurisdiction; found pledges; and made protestation to follow, &c.; that thereupon *a process* was directed to the defendant to seize his goods and chattels, in order to bring him to appear; that by virtue thereof they attached him by his goods and chattels in the declaration mentioned, and them safely kept to the intent to compel an appearance.

CARTHEW, on demurrer to the plea, took several exceptions:

FIRST,

Court held by letters patents and custom.

FIRST, They shew the court to be held by *letters patent* and *custom*, which is repugnant.

2. Jones, 165.
3. Lev. 141. 243.
Lutw. 918. 1457. 1464.

PRAT *contra*. We shew the court was held by several letters patents, and we need not shew by what king or queen, or the date of them; and as to *consuet.* without *tempore cujus, &c.* it does not imply a prescription, but only an usage.

Court held according to custom of the court.

SECONDLY, It is said to be held according to the custom of the said court, which is absurd; for it should be, by custom of the vill or borough in which it is held.

See the case of Williams v. Jones, B. R. H. 298.

A justification by virtue of process must alledge that it was delivered to the defendant.
2. Lev. 19.
3. Lev. 93.
5. Com. Dig. "Pleader" (3. M. 24.).

THIRDLY, It is not said that the process was delivered to them so as they might execute it; and the *virtute cujus* is not traversable; and therefore in all pleadings where the sheriff justifies by virtue of a writ, he alledges, that before the execution the writ was delivered to him, and the *virtute* comes after, otherwise anybody might take upon himself to execute a writ sued out, though not delivered to him.

PRAT *contra*. We are upon a general demurrer, and we say it was directed to us, and that by virtue of it we seized them, which is impossible to be true if it were not delivered to us.

The bailiff of an inferior court who abuses the process is a trespasser *ab initio*.
Post. 139.
8. Co. 146.
2. Roll. Ab. 561.
Moor, 248.
1. Lev. 95.
4. Mod. 391.
Stra. 1272.
2. Wils. 313.
2. Bl. Rep. 1218.
1. Ter. Rep. 12.

FOURTHLY, The attachment ought to be moderate and reasonable, as to the value of twelvepence, eighteenpence, or two shillings, at first, and if he did not appear upon that, to double that infinitely; and here they have taken all the party's goods; so that if we had come with affidavits of this oppression, you would have granted *an attachment* for the abuse; and if one abuse the authority the law gives him, he is a trespasser *ab initio*, for the diversity is between licence of law when abused and actual licence of the party (*a*).

PRAT *contra*. The process is to attach him *per bona et catalla*; and the law does not define how much they shall take; and it is in plaintiff's power to have all by giving an appearance, and they are only to be a pledge for his appearance in the mean time.

*[71]

When a sheriff justifies under a *writ*, he must shew it returned.

* FIFTHLY, Though they were aware they must shew a return; for whenever the sheriff, or officer to whom the writ is directed, will justify under it, he must shew a return, otherwise if under bailiffs to a sheriff (*b*); and here they only say, *debito modo retornat.* which might be if they had returned *nulla bona*; and the Court could not make them mend or change it.

PRAT *contra*. We ought to make a return true, and we have so done; for when we confess that we have taken the goods, and alledge a return *debito modo*, that must be according to truth.

(*a*) See the Six Carpenters Case, 8. Co. 146.

(*b*) Cro. Car. 446.

SIXTH

SIXTHLY, We charge them in the declaration with having taken the goods and carried them away, and they justify only the *taking*, and say nothing as to the carrying away.

BRIGG against COLLINGSON.

TREVOR, *Chief Justice*. You have not answered the *carrying away*, so it is not within your *not guilty*, nor admitted by your *justification*; for if you justified the carrying them away, perhaps you would have given them a new cause of demurrer, for they should not have carried them away until failure of appearance: as to the excess, that will not make it a trespass, for that is only an irregularity; and your saying in the declaration that they were of such values is nothing.

CURIA *accord.* and seemed strong for the plaintiff for want of answer to *asportation*. but gave him time until next Term to maintain it.

Bishop of Durham *against* Ladler. Case 83.

Debt upon a bond given to a bishop for submission, &c.

5. Com. Dig. "Pardon" (F.).

DEBT UPON A BOND conditioned for the obligor's submission to the church.

The bond was given in the year 1693, and there being a general act of pardon since that time,

The question was, Whether, since that act took away the offence and excommunication, it would not likewise discharge the bond?

And the case of the *Bishop of Exeter v. Sterling* in my LORD HALE's time, now in *Levinz's Reports* (*a*), was remembered, and said, that there never was any judgment upon THE ROLL.

It went over to be spoke to this Term.

(*a*) 2. Lev. 36.

*[72]

* Michelson *against* Cawsey. Case 84.

Quære, In an action for an escape from custody under process of an inferior court, whether it be necessary to state in the declaration by what authority the Court was held.

AN ACTION UPON THE CASE for the escape of one taken upon the process of an inferior court. The plaintiff declared, that he levied *a plaint* such a day, &c; that process issued, and was delivered to the defendant, who, by virtue thereof, took the party at such a place, &c. and suffered him to escape, *per quod*, &c.

The exception taken to the declaration was, that it did not shew by what authority the court was held, and then the whole proceedings were void, and therefore the imprisonment was false, and the escape no offence or injury to the plaintiff.

Ante, 61. Vaugh. 93, 94. Yel. 46. Cro. El. 430. Cro. Jac. 184. 493. 532. Cro. Car. 46. 2. Jo. 451. Ld. Ray 1543. 11. Mod. 50. 12. Mod. 598. Ld. Ray 424. 553. 651. 705. 738. 1530. Stra. 873. 901. 951. 1226. 3. Com. Dig. "Courts" (P. 6.). 5. Com. Dig. "Pleader" (E. 18.).

And

MICHELSON against CAWSEY.

And for this was quoted *Turner's Case (a)*, where, in pleading a judgment in an inferior court, the party was forced to shew the authority of the court, and to give it jurisdiction. And if so in a plea in bar, which is good to a common intent, *à fortiori* it will be in a declaration which charges the party, and therefore must be certain to all intents: and here if there were no legal court, or if it wanted jurisdiction, the officer would be liable to an action of false imprisonment, and likewise to an escape. And it was said, that it is essentially necessary, let the plaintiff be a stranger or privy, to give the court jurisdiction.

CARTHEW answered with this diversity, that any who is an officer of the court, or acts under the authority of it, and by consequence ought to be conusant of it, ought in pleading to set it forth; but strangers, as the plaintiff is here, need not do it. 2. The *plaint*, the *process*, and the *arrest*, are only inducements to the action, and the *escape*, whereby, &c. is the substance; therefore it suffices if the substance be well set forth, and that is done here. And for this he quoted the case of *Hodges v. Moyse (b)*. Besides, he urged that though this would be the cause of reversal or irregularity, yet the sheriff could not take advantage of it. In the case of *Gould v. Stroud (c)*, an action for an escape was brought against a sheriff; and it appeared, that the action was brought upon a judgment in WESTMINSTER-HALL by an administrator, and that administration was committed to him by the ordinary of another diocese, so as it was utterly void; and yet plaintiff had judgment.

TREVOR, *Chief Justice*, and BLENCOE, *Justice*, conceived the law to be, that where-ever one justifies by virtue of proceedings of an inferior court, or makes it a ground for an action, he ought to shew the authority by which the court is holden, and that the whole of the proceedings were the *gist* of the action here, and if that were actually void, that the plaintiff ought not to have judgment, though the officer cannot take advantage upon error in process. But they doubted whether the defendant, having taken upon himself to arrest him, did not thereby make himself liable to an escape.

But TRACY, *Justice*, seemed to differ from them, upon the authority of *Hodges v. Moyse (d)*.

And it was *Curia advisare vult*.

(a) 8 Co. 133

(b) Cro. Car. 45, 46.

(c) Gould *v.* Stroud, Mich Term, 2 *Will.* 3. in king's bench.—See also Cro. Eliz. 875. 2. Mod 195

(d) Cro. Car. 45.

MICHAELMAS TERM,

The Second of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Turton, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Esq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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* Warren *against* Mathews.

Case 85.

Lawful fishing. S. C. 1. Salk. 357. 2. Salk. 637. 6. Com. Dig. 56.

PER CURIAM. Every subject of common right may fish with lawful nets, &c. in a *navigable river*, as well as in *the sea* (a), and the king's grant cannot bar them thereof; but the crown only has a right to royal fish, and that the king only may grant.

(a) See Lord Fitzwalter's Case, 1. Mod. 106. 2. Lev. 139.; Carter *v.* Murcot, 4. Burr. 2163.; Seymour *v.* Courtness, 5. Burr. 2814.; Mayor of Lyner *v.* Turner, Cowp. 16.; The Mayor of Oxford *v.* Richardson, 4. Term Rep 437. —But see the judgment in this last case reversed, 2. H. Bl. Rep. 182.

Anonymous.

Case 86.

No action for malicious prosecution will lie if there was *probable cause.* Ante, 25.—4. Burr. 1971. Post. 216. Ld. Ray. 81. 377.

THE COURT HELD, That let a prosecution be never so maliciously carried on, yet if there be *probable cause* or ground for it, no action for malicious prosecution will lie (a).

(a) An action for malicious prosecution will not lie for bringing a *civil action*, although the plaintiff has no grounds for it, because it is a claim of right, Savil *v.* Roberts, 2. Salk. 14, 15. *Sed vide* Wateren *v.* Freeman, Hob. 260. but it will for holding to bail for a greater sum than is really due, Dare *v.* Swaine, 1. Sid. 424. Skinner *v.* Gunton, 1. Saund. 228. or for suing in a good cause of action in a court that has not jurisdiction, Godlin *v.* Wilcox, 3. Wils 302. Atwood *v.* Monger, Stiles, 378 but in such case it must be a want of *original jurisdiction*, Watchouse *v.* Bawd, Cro. Jac. 133. But to maintain this action it is now settled that the plaintiff must shew both *malice* and a want of *probable cause*, Bull. N. P. 14. but *malice* may be inferred from the want of *probable cause*, Johnston *v.* Sutton, 1. Term Rep. 544. Reynolds *v.* Kenedy, 1. Wils. 232.

Saunders

Case 87. Saunders *against* Melhuish.

In ejectment, if the tenant be tricked out of possession the Court will order restitution, and commit the parties to answer interrogatories.
S. C. Ante, 16.
S. C. Holt, 136.
1. Barnes, 125.
2. Barnes, 157.
12. Mod. 211. 313. 398. 445. 653.
2. Com. Dig. "Chancery," (D. 3.)
Tidd's Prac. 52.

MELHUISH h d got an unknown person to assume the name of *tenant in p ssession*, and to personate him in receiving a declaration in ejectment; and, upon the usual affidavit, tricked the plaintiff out of his possession.

And the matter being made out by affidavits, and even by the affidavits of the two comrogues, *viz*. he that delivered, and the other that received the declaration,

THE COURT ordered restitution; for no man's possession ought to be disturbed upon the affidavits of such infamous witnesses.

And *Melhuish*, the plaintiff in ejectment, attending, was committed to answer interrogatories.

For HOLT, *Chief Justice*, said, When one is put to answer interrogatories for a fact fully proved against him, he ought to answer in custody; but where it is any thing doubtful, the course is to put him to answer, that is, to bind him by recognizance to answer. And in either case, if they purge themselves upon oath, they are discharged; but they may be prosecuted for *perjury* if they swear false (*a*). And if the interrogatories be not exhibited in *four days*, by the course of the court they are discharged.

(*a*) 2. Jones, 178. 3. Burr. 1329. Dougl. 498. 2. Hawk. P. C. ch. 22. s. 1.

Case 88. The Case of Elderton, Porter, and Others.

Qu. Whether the commissioners of the *Board of Green Cloth* can, as justices, commit a man to "the porter "of the verge."
S.C. 2. Ld. Ray. 978.
S. C. 3. Salk. 91. 384.
S. C. Holt, 590.
1. Mod. 76.
1. Vent. 169.

THE defendants were taken up by a warrant from the LORD HIGH STEWARD, treasurer, comptroller, and clerk of THE GREEN CLOTH, setting forth a complaint made to THE BOARD OF GREEN CLOTH, of a forcible entry made by them into a house in *Scotland-Yard*, in the queen's royal palace of *Whitehall*, riotously, and in contempt of the privileges of the queen's palace, and without warrant from THE GREEN CLOTH.

The warrant was directed "*portatoribus virgarum hospitii* of "the queen;" and they not giving bail, were committed to LOVET, *porter of the palace*, "to receive and keep them till they gave bail "for appearance at the next sessions to be held for THE VERGE, or "until he received further directions from THE BOARD OF GREEN

* [74]

"CLOTH;" and * being brought up by *habeas corpus*, a return was made to the commitment for the cause aforesaid, by the persons aforesaid, all of whom were returned to be *justices of peace* for THE VERGE.

2. Mod. 181.
Philip's Regale necessarium, chap. 1. and 3.
Pryn on 4. Inst. 23, 19.
12. Mod. 102. 155. and see the case of Rex *v.* Stobbs, 3. Term Rep. 735.

MONTAGUE took these exceptions:

FIRST, The warrant sets forth an information made to this board, without shewing what board; and if it had expressed THE BOARD OF GREEN CLOTH, it had not mended the matter; for as such

such their power is only over the servants of the family, and over none else, even in case of trespass or bloodshed, or any other breach of the peace; for that which gives them a power is the statute of 33. *Hen.* 8. c. 12. and therefore they have no farther authority than that act gives them.

THE CASE of ELLERATON, PORTER, AND OTHERS.

SECONDLY, The queen did not then actually reside there, nor does it set forth that she did, and it cannot be said a breach of privilege, for two reasons: *First*, The queen's honour is as much concerned that the process of law should be duly executed, as in the privilege of her palace. *Secondly*, By the late act of parliament all privileges are taken away; and that act is to be construed favourably in the execution of justice.

A PALACE retains its privileges, though the court and king wholly remove from it.

Salk. 91. 284.

THIRDLY, If it be said, that they have conusance of it as justices of peace, they should have committed them as such, and under a proper officer, as constable, &c.

A justice need not mention in his warrant, that he is a justice.

Ld. Ray. 65. 100. 213. 323. 353. 396. 424.

FOURTHLY, The conclusion of the commitment is not legal; for it should be, "till they are delivered by due course of law;" but this is, "till they find surety for their appearance at the next "court of THE VERGE" (*a*), and it is not said when that is to be, or that ever there will be any.

Conclusion of warrant of commitment.

FIFTHLY, They say, it was in breach of the privilege of the queen's court, but they do not state what those privileges are, that the Court may judge whether this fact be against them.

NORTHEY, *Attorney General*, for the return,

FIRST, The authority of the party committing never appears upon the commitment, but always upon the return, and that is the right way. It is objected, that they have no power to commit as A BOARD. But I answer, that it is not necessary to inquire into their power as they are A BOARD now, for though they meet there about other business, yet their being there does not make them cease to be justices of the peace, and they have their sessions for THE VERGE, and the commitment is, "till they find surety for "their appearance at the next sessions of THE VERGE." It never was the intent of the late statute (*b*) to expose the queen's palace to the disorder that often attends execution of process: and he quoted *Jacob Hall's Case* (*c*). There needs not an act of parliament to make A PALACE, for it is the king's right to declare a royal palace, and the privileges follow of consequence: *King William* declared KENSINGTON a palace. * Warrants are not like pleadings, as being made by persons entrusted with the execution of the law, but have not the nice knowledge of it. Commitment till he find bail, or commitment generally for want of bail,

1. Vent. 169. 2. Keb. 846. 2. Mod. 181. 1 Mod. 76. Vid. 3. Inst. 141. 27. Ass pl. 49.

* [75]

Phillip's Regale necessarium, cap. 1. and 3. and vide Wilkins L.L. Æthelstani, p. 63. and Hen. 1. p. 245. 1. Salk. 348, 349. 351. &c.

(*a*) 2. Inst. 52. 591. 1. Lev. 230. Cro. Car. 558. 5 Mod. 308. 2. Hawk. P. C. ch. 16. s. 18. *antè*.

(*b*)

(*c*) 1. Mod. 76.

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bail, is the same; for whoever is committed for want of bail, is in truth committed until he find bail. Where-ever there is a palace, the privilege of a palace is incident to it, whether there be an actual residence or not; and the statute of 33. *Hen.* 8. c. 12. was needless, though it makes this case the stronger; and that statute setting limits to WHITEHALL, shews that there are local privileges belonging to THE PALACE; and what can they be, if they be not that something may be lawfully done elsewhere that may not be so done there? This being in the outward part of THE PALACE makes no difference, for they shall set no other bounds to privileges than the act has done here.

HOLT, *Chief Justice.* It need not appear in the warrant or commitment that they were justices of peace, but that is always upon the return. These fellows are very wilful, for either they are right or they are wrong, and why may not they find bail, and have the matter determined legally? There is a commission of *oyer and terminer*, and a commission *of the peace* for *the verge*; and THE LORD STEWARD has only a commission for *the houshold.* The matter therefore will be only this, Whether this being done within THE QUEEN'S PALACE, and it not being said that the queen was actually residing there; that is, Whether the privilege be not confined to the residence? Another question will be, in case it be confined to a residence, What will amount to a residence? For suppose the queen were at *Windsor*, and a murder was committed at *Whitehall*, should THE LORD STEWARD judge of it upon the statute of 33. *Hen.* 8. c. 12.? Or suppose it were now at *Winchester*?

NORTHEY, *Attorney General*, put the *case of Burchett* (*a*), who killed his keeper in THE TOWER, and though the king did not reside there, yet because it was in his palace, his hand was cut off first, and after he was hanged.

HOLT, *Chief Justice.* Though the words of the statute be, "or other house where the king is resident," those words are only to give the same privileges to houses that are not palaces during the king's residence. As to the objection, that they are committed for not giving security to appear at the sessions of THE VERGE, and it does not appear that they have jurisdiction of it, we are judicially to take notice of all things belonging to THE QUEEN, and by consequence of the power and jurisdiction of the session of THE VERGE of the palace.

POWELL, *Justice.* Sure the words "other houses where the "king resides," is only applicable to houses, not palaces, and sure the privilege of a palace is not confined to actual residence (*b*). And he insisted on *Burchett's Case* aforesaid.

[76] THE OTHER TWO JUDGES seemed of that opinion: and besides, if it were confined to a residence, the queen's secretary of state keeping his office here, would be good evidence * of a residence,

(*a*) 3. Inst. 140.

(*b*) See 1. Hawk. P. C. c. 21. f. 2.

POWELL,

POWELL, *Justice*, said, that he had known arrests condemned for being in *Whitehall* without leave; and if an arrest be made in *Westminster-hall*, sitting the court, it is a *contempt*; and why may not it be the same if in THE QUEEN'S PALACE, to the disturbance of the queen or her servants? And the consequence might be very dangerous, to suffer a number of fellows in a rude manner, under colour of process, to enter into THE QUEEN'S PALACE. It is true, we do not know in this court that THE BOARD OF GREEN CLOTH has jurisdiction here, but the members are returned to be *justices of the peace*, and we know there is a commission of *the peace*, and of *oyer* and *terminer*, for THE VERGE, which gives power to punish riots, trespass, &c. THE CASE OF ELDERTON, PORTER, AND OTHERS.

He said farther, that THE MARSHAL of the queen's house is the gaoler, and that the commitment properly ought to be to him; but perhaps it might be to *the porter*, in order to carry the prisoner to THE MARSHAL, as in this court to *a tipstaff*; but still the commitment ought to be to THE MARSHAL, and their authority is to commit as *justices of peace*, and not as *a board*. It is true, if the commitment had been by them generally, we would have understood it to have been in that capacity in which they lawfully could do it; but whether they have not tied it up to their power as BOARD OF GREEN CLOTH, so as to leave no room for such intendment, is a question. However, if the commitment should be bad for these faults, we may indeed discharge the defendants of their present imprisonment, and bind them to appear at the sessions of GREEN CLOTH; as if a commitment be to *The New Prison*, it is not lawful, as not being a legal gaol, yet we will not set the party at liberty, but commit him legally by virtue of the universal power of the Court: and though this *porter* be not a proper officer, we may remand them to him until we consider of the matter, and order them to be brought up again by rule, and all matters to stay in the mean time as they are.

And after the return was filed, though they offered bail for their appearance here the last day of Term, yet THE COURT remanded them, and gave rule for the bringing them up two days after, and would not bail them in the mean time. Court remanded the prisoners without bail.

NOTE, The Chief Justice upon this occasion ordered the record of *Burchett's* attainder to be brought into court, and it is *Michaelmas Term*, 15. & 16. *Eliz. Roll.* 2. and there is no judgment there that his hand shall be cut off, though THE CHIEF JUSTICE said, his hand had been in truth cut off, and so is my *Lord Coke* and *Stow's History*.—Nothing further was ever done in this matter that I have found. But *vide postea*. Punishment for striking in a royal palace. 3. Inst. 140. 2. Inst. 549. Vide 2. E. 3. 13 and 19. E. 3. F. Judgment 174. 51. E. 3. F. Coron. 280 Dyer, 188. St. 25 E. 3. c. 1. and note 33. H. 8. c. 12. of striking in the king's court, 3. Inst. cap. Misprision. Philip Regale necessarium, 18. 24. &c. 39. E. 3, 4. 35. Mich. 40. E. 3. 4. 34. Flet. lib. 2. c. 23. Ryley Plac. part 6, 7. 27. Ass. 49. Pryn. on 4. Inst. 18, 19. Cotton, &c. 1. Lev. 106, 107. 1. Sid. 211. Cro. Car. 272. 4. Bl Com. 125. 273.

Case 89. * Overseers of the Poor of the Parish of St. Andrew.

An appointment of overseers must state them to be *substantial house-holders*, pursuant to 43. *Eliz.* c. 2. 2. Salk. 525. Foley, 5. Sayer, 279. Stra. 1261. Ld. Ray. 1394. 2. Term Rep. 406. 395.

AN order of two justices for one's taking upon him the office of overseer of the poor, being removed,

MONTAGUE took several exceptions against it.

FIRST, That it did not appear by it, that the party was an inhabitant or a house-keeper, and you will not intend him to be either; for it is not like the case of *Kibbet v. Lee (a)*, where a man shall be intended to be in his senses, or a witness credible, until the contrary appears: and the way is, for the parish to present these officers to the justices to be by them confirmed.

Qu. If an appointment of overseer for that part of the parish which lies in a particular county, be good. Sayer, 278. 1. Bott P. L c. 1. f. 7. 4. Term Rep. 550.

SECONDLY, The order appoints him overseer of the poor of that part of the parish that lies in *Middlesex*, (for the parish of *St. Andrew* extends both into *London* and *Middlesex*); and for this the case of the house of correction for *Blackheath* was relied on.

THE COURT seemed to think that the appointment ought to have been for the whole parish; but that afterwards they might order him to meddle only with such a division.

(a) Hob. 312.

Case 90. Lutterell's Case.

After a verdict in *trover*, an indictment will lie for *trespass* in taking the same goods; but if the taking be *felonious*, no verdict can be given. 3. Inst. 213. Hob. 138. 2. Lev. 208. 2. Hawk. P. C. ch. 47. f 6.

BY HOLT, *Chief Justice*, at *nisi prius*, *ut audivi*, this difference was taken: If a civil action be brought, as *trover* for goods, after recovery, you may indict him for trespass or felony for the same taking, because the offences or causes of action are of a different nature, the one civil, and the other criminal; but if the first prosecution had been criminal, as an indictment for trespass, &c. and the crime appears to be felony, there you cannot have verdict or judgment on the indictment for trespass, it being the inferior. And this, he said, had been adjudged in *Mr. Luttrell's Case*.

Case 91. Jordan against Thomkins.

Indebitatus assumpsit lies for diet found for a third person. Post. Hob. 216. 1. Vent. 6 Raym 302. 1. Salk. 22. 25.

INDEBITATUS ASSUMPSIT for meat, drink, and lodging found for a third person.

It was moved in arrest of judgment, that *indebitatus assumpsit* will not lie, but that it ought to have been a special action upon the case.

But PER CURIAM, It lies against him upon *the contract*; as if *A.* desire *B.* to cure the horse of *C.* and that he (*A.*) will pay him so much, an *indebitatus* will lie against *A.* and only against him. But they agreed that it would not lie for money won at play, but a *special assumpsit*.

And the plaintiff had judgment.

Anony-

Anonymous. Case 92.

PER CURIAM. If one give a warrant of attorney to confess a judgment for the saving bail harmless, though the debt be not paid, he cannot sue execution before damnification.

Bail cannot sue on a counter security till they are damnified.

a. Bl. Rep. 795. 1. Term Rep. 86. 3. Term Rep. 539.

* Smith *against* The Mayor and Aldermen of London. Case 93.

A MERCHANT who had broke, and run away beyond sea, consigned goods to three persons here for the equal benefit of his creditors, two whereof were his consignees, and set up a trustee for them to *attach* the goods in *London*: The third consignee, to whom nothing was due, offered to appear; the other two would not appear; and the Court would not receive the third man's appearance without he appeared for all, which he could not justify doing, having no warrant for it.

If goods be consigned to three persons *in trust*, and the goods are *attached* in *London*, one of the consignees cannot appear without the others.

And now *a prohibition* was moved for, because they refused his plea.

HOLT, *Chief Justice*. If they refuse your plea, your way is by *bill of exceptions*: if they proceed otherwise erroneously, you may have *a writ of error*; and we are not to *prohibit* inferior courts because they proceed against law, for in that case the law gives another remedy.

A *prohibition* does not lie to an inferior court for proceeding *erroneously*, unless the cause be out of its jurisdiction.—1. Salk. 288.

SECONDLY, Upon *an attachment* of goods there goes a *scire facias* by way of *garnishment*, and two of the *garnishees* will not appear; the third offers to appear and plead, but is not admitted without appearing for all Sure this course is of very ill consequence, and here we can have no *bill of exceptions*, because we are not in court until appearance; and they will not suffer us to appear, though a *bill of exceptions* be always of matter not appearing of record.

Process upon an attachment in *London*.

Skinner, 516. 669.
12. Mod. 213. 249. 320. 326. 407.

And THE COURT were strong against the custom of compelling one *garnishee* to appear for the rest.

And here they said, there could be no *certiorari*, because they could not proceed in this court according to the custom of *London*.

A *certiorari* does not lie to remove a *foreign attachment*.

DEE, *the Common Serjeant*, said, that in such case, if he had put in bail, and waged his law alone, it would have dissolved the *attachment*.

This case was put: If *a præcipe* be brought against two, and one of them appears, and takes the whole tenancy upon himself, and traverses the other's having any thing, and pleads in chief, he may do it.

And *Curia advisare vult*.

The

Case 94. The Queen *against* Ball.

If a person committed on an *excommunicato capiendo* escape, a *new writ* shall issue, if the sheriff has not returned the old writ, or the party been removed by *habeas corpus*.

BALL was charged in the sheriff's custody upon an *excommunicato capiendo*, and committed to THE FLEET charged therewith, and was removed from thence by *habeas corpus* to THE KING'S BENCH, where he was suffered to escape.

And what could be done, was the question.

FIRST, it was agreed, that if the first writ were not returned, they might take a new one, and thereupon take him up *de novo*; otherwise, if it were returned, 1. *Roll. Rep.* 174.

* [79]

Ante, 21, 22. 37. 63. Post. 95. 125. 154. 283. 4. Com. Dig. "Excommengment" (B. 4.). Stra. 43. 901. Ld. Ray. 788. 527. 3. Mod. 275.

SECONDLY, it was doubted, whether there could be a new writ in case the former had * not been returned, because by the *habeas corpus* and the return thereof here on record, it appears that he was in execution upon that writ.

THE COURT. If the escape had been in the present marshal's time, we could make a rule upon him to take him up, but we cannot do it now, the escape having been in the former marshal's time; because, if the escape were voluntary, the former marshal could not justify doing it himself; and let us consider whether we cannot make a record of his having escaped, and award a new writ.

PER CURIAM. Let it stay a little, and know whether the former writ be returned.

Case 95. Jonson *against* Shepney.

The court of admiralty has jurisdiction in the case of an *hypothecation* made by the master of a ship for necessaries occasioned by distress *at sea*, although the contract was *upon land*.

A SHIP being in distress, on the high sea, in her voyage, put into *Boston* in *New-England*, and there was *hypothecated* by THE MASTER for necessaries.

And being libelled against here, *a prohibition* was moved for, because the contract appeared to be upon land, even on their own libel.

It was urged against it, that if the distress, which occasions the contract, be on sea, though the things be bargained and agreed for at land (for it is not to be supposed they can be had at sea), in case of *hypothecation* they have jurisdiction, otherwise the prejudice would be intolerable to navigation. And the case of *Benson v. Jeffries*, in Hilary Term, 1696. was quoted.

S. C. 1. Salk. 35. S. C. 11. Mod. 30. S. C. Holt, 48. S C. 2. Ld. Ray. 982. Ante, 11. 25. Hob. 12. 115. 1. Vent. 32. 238. Latch, 252. 1. Lev. 267. 1. Sid 418. 2. Keb. 511. 610. Moll. Lib. 2. c. 2. f. 14, 15. 3. Mod. 244. Hob. 12. Latch, 252. 1. Vent. 32. 3. Mod. 244. Ld. Ray. 152. 577. 805. 933. 12. Mod. 406. 511. Stra. 695. 3. Term Rep. 323.

HOLT, *Chief Justice.* When a ship is in distress in her voyage, and *hypothecated* for necessaries, we allow THE ADMIRALTY a jurisdiction, for there is no other way for the captain to have credit but that, and they can have no remedy by our law against the ship. This point was argued and resolved by all the Judges in the case of *Crostwick v. Lowsely*, in the first year of *William and Mary (a)*.

(a) 1. Salk. 34.

And

Powell, *Justice*, added, that although in that case the libel laid the contract to have been *super altum mare*, yet the Court took notice of it as done at *Rotterdam*; but being in the voyage, and occasioned by a distress at sea, it was held well enough within their jurisdiction. The *bypothecation* of ships is absolutely necessary for the preservation of navigation; for the masters have nothing else to get credit with, and the admiralty is the only court that can give them remedy: if a ship in HARBOUR here in *England* be *hypothecated*, they shall not sue for it here. The master cannot at any time *sell*, but he may *hypothecate* in the voyage for necessaries (*a*).

Jenson against Sarpner.

But the libel being against *the ship* and *the party*, the Court said, they would send *a prohibition* as to him, unless *quatenus* it is necessary to make him *the party* towards the condemnation of *the ship*.

If the admiralty proceed against both *the owners* and *the ship*, a prohibition lies as to the owners. S. C. 2. Ld. Ray. 984. 6. Vin. Abr. 523. 1. Term Rep. 79. 3. Term Rep. 270.

And so it was done.

(*a*) See Menetone *v.* Gibbons, 3. Term Rep. 267. in which it is determined, on the authority of this case, that the court of admiralty have cognizance of an hypothecation bond given in the course of a voyage, though it be executed on land, and *under seal*; and by the case of Ladbroke *v.* Crickett, where the court of admiralty have given a sentence, it shall be taken that they had jurisdiction, unless the contrary appear on the face of the proceedings. 2. Term Rep. 649.

*[80]

Case 96.

* Day *against* Musket.

TRESPASS in the time of king *William the Third*; and so laid with a *contra pacem* of the present *Queen Anne*.

Trespass laid in the time of *king William*, and *against the peace* of *queen Anne*, is bad on demurrer, but good after verdict. S. C. 2. Salk. 640. S. C. 2. Ld. Ray. 985. 22. *Edw.* 4. pl. 24. Latch, 260.

This was said to be a description of the trespass, and an impossible one, and therefore not good.

Against which was quoted 1. *Sid.* 253. that trespass in two kings reigns ought of right to be laid *contra pacem* of both; but, however, that was but form.

Powell, *Justice*, quoted the case of *Melwood v. Leach* (*b*), where it was held fatal.

The Court said, that many actions upon the case for misfeazance are laid *contra pacem*, and that it is not wrong to do so, as in actions for nuisance.

And at another day the Court said, that the omission of *contra pacem* might be but form, but being put in as *a description* of the trespass, which is repugnant, though it would be well after verdict, yet being on demurrer, it was therefore fatal (*c*).

The plaintiff had leave to *discontinue* upon payment of costs (*d*).

(*b*) Hilary Term, 7. *Will and Mary*, in the king's bench. 1. Ld. Ray. 38.

(*c*) See the case of Rex *v.* Lookup, where an indictment alledging perjury in the time of *George the Second*, and concluding *contra pacem* of *George the Third*, was, for this reason, held erroneous by THE TWELVE JUDGES. 3. Burr. 1903.

(*d*) By 16. and 17. *Car.* 2. c. 8. s. 1. and 4. and 4. *Ann.* c. 16. s. 1.

Case 97. Battersby *against* Marsh.

Abatement to an addition of "*gentleman*." Post. 105. 1. Lut. 238. Ray. 449. 5. Mod. 364. Skinner, 15. Ld. Ray. 849 859. 1179. 1541. 8. Mod. 91. 12. Mod. 249. 3. Peer Wms. 65. Comy. Rep. 371. Strange, 556. 816.

THE PLAINTIFF in his bill declared, and called himself a *gentleman*: the defendant pleaded in abatement, that he was no *gentleman*: to which plaintiff demurred.

PER CURIAM. The plea is good, being confessed by the demurrer.

But it being after *general imparlance*, they put him to answer over.

Case 98. Brough *against* Perkins.

In an action against *the drawer* of an *inland* bill of exchange, it is not necessary to set forth *a protest*; for the statute 9. and 10. *Will.* 3. c. 17. does not destroy *the action* for want of a protest, but only deprives the party from recovering *interest* and *costs*; and therefore if *the drawer* sustain damages for want of a *protest*, they shall be borne by *the holder*.

* [81]

S. C. 1. Salk. 131. S. C. 3 Salk. 69. S. C. Holt, 121. S. C. 2. Ld. Ray. 992. Ante, 29. Ld. Raym. 743. 12. Mod. 309. [illegible]. N. P. 278. Bayley on Bills, 40. 45.

WRIT OF ERROR of a judgment upon *nil dicit* in the court of common pleas, in an action brought against *the drawer* of an *inland bill* of exchange.

RAYMOND objected, that since the statute of 9. and 10. *Will.* 3. c. 17. no damages shall be recovered against *the drawer* upon a bill of exchange without *a protest*, and therefore the action lies not, here being none.

HOLT, *Chief Justice*. The statute never meant to destroy the action for want of *a protest*, but only to deprive the party from recovering *interest* and *costs* upon an *inland bill* against *the drawer* without notice of non-payment by protest; for before the statute there was this difference between *foreign bills* and *inland bills* of exchange: if a bill were foreign, one could not resort to the drawer for non-acceptance or non-payment without a protest, and reasonable notice thereof; but in case of inland bills, there was no occasion for a protest; but if any prejudice happened to the drawer by the non-payment of the drawee, and that for want of notice of non-payment, which he to * whom the bill was made ought to give, the drawer was not liable; and the word "damages" in the statute was meant only of the damages that the party is at in being longer out of his money by the non-payment of the drawee, than the tenor of the bill purported, and not of damages for the original debt: and the protest was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a protest, that shall be borne by him to whom the bill is made; and if no damages accrue to him, then there is no harm done to him. A protest is only to give formal notice that the bill is not accepted, or if accepted, that it is not paid; and if in such case the damage amount to the value of the bill, there shall be no recovery, but otherwise he ought not to lose his debt: but that ought to appear either in evidence upon *non assumpsit*, or by special pleading. The act is very obscurely and doubtfully penned, and we ought not by construction upon such an act to take away a man's right.

THE WHOLE COURT were of the same opinion.

ANO-

ANOTHER EXCEPTION was, that the *writ of inquiry* in the common pleas is returnable *quinden' Martini*, which is always on the twenty-fifth of *November*, a fixed day, and it is returned as executed the twenty-fifth of *November* last; that is, on the day on which it is returnable, and that is a contradiction.

A writ of inquiry may be executed on the day of its return.

Post. 148. 159. 189. 250. Carth 70. 362. 371. Fort 372. 2. H. Bl. Rep. 29. and see the case of Harvey v. Broad, 6 Mod. 148. 159. 196. 250.

But by HOLT, *Chief Justice*, though a writ be returnable on such a day, yet they never come in until the *quarto die post*, and a writ may be executed on the day of its return.

AND HE AGREED, that they must judicially take notice on what day *quinden' Martini* falls, because they must take notice of *Festum Sancti Martini*, and on what day it is, and THE ALMANACK is part of the *law of England*: and so of *annus bissextilis*: and that it would be the same in case of moveable Feasts; for the diversity between fixed and moveable Feasts is ridiculous; for if we judge of fixed Feasts by THE ALMANACK, as the book that takes the diversity admits, why not of the other? But THE ALMANACK to go by is that which is annexed to THE COMMON-PRAYER-BOOK.

The Court will take notice on what day *quindena Martini* falls; and THE ALMANACK is legal evidence of it.

1. Leon. 242. Ante, 41. Post. 148. 160. 252. 1. Leon. 242. 10. Mod. 105.

And the judgment was affirmed by the whole Court.

Salk. 626. Ld. Ray. 4. 281. 870. 1557.

Presgrove *against* Saunders.

Michaelmas Term, 1. Anne, Roll. 467.

Case 99.

REPLEVIN for several things: As to some, the defendant pleaded *property in himself*, and to others *property in a stranger*, in bar.

In REPLEVIN, "property in a "stranger" may be pleaded *in bar* or in *abatement*.

S. C. 1. Salk. 5. S. C. Holt, 562. S.C. 2. Ld. Ray. 914. Post. 103. Ante, 69. 31. *Hen.* 6. 12. 1. Salk. 5. 94. Ld. Ray. 217. 984.

It was objected, that *property in a stranger* could not be pleaded in bar (*a*).

But HOLT, *Chief Justice*, said, that he remembered to have heard HALE make the difference, that if *property* be pleaded in the defendant, it may be either pleaded in *bar* or *in abatement*, but if in stranger only in *abatement*; but that upon great deliberation it had been held since, that there is no difference at all, for both may be pleaded *in bar*, according to the case of *Sackild v. Sexton* (*b*).

And judgment was given, that the plaintiff *nil capiat per billam*, and a return was awarded PER CURIAM.

2. Lev. 92. 1. Salk. 94. 1. Leon. 42. 1. Show. 401. 5 Com. Dig. "Pleader" (3. K. 12.). 1. Bac. Abr. 14, 15.

(*a*) 1. Vent. 149. 2. Lev. 92. (*b*) Cro. Jac. 519.

*[82]

* Robison *against* Calwood.

Case 100.

DEBT upon bond for performance of an award; the condition was to stand to, &c. so as it be ready to be delivered at such a time; "*no award*" was pleaded; and an award set forth, but it was not said, that it was ready to be delivered at the time.

Pleading that an award was *made*, implies that it was *ready* to be delivered.

1. Salk. 69. 75. Post. 160. 1. Cro. 541. 1. Keb. 739. 1. Lev. 133. 2. Ld. Ray. 989. Kyd on Awards, 195.

ROBISON *against* CALWOOD.

HOLT, *Chief Justice.* As soon as the award was made it was ready to be delivered, and so I remember it has been adjudged.

But the judgment was stayed upon another exception.

Case 101. **William *against* Farrow.**

If a *feoffment* be pleaded in satisfaction of *a bond*, the acceptance must be laid in the county where *the feoffment* was made.

Carth. 238. 347. 2. Lev. 165. 12. Mod. 85. Ld. Ray. 122. Stra. 426. 573. 615.

DEBT upon bond laid in *London*; and a feoffment of land in another county in satisfaction thereof, and the acceptance thereof in satisfaction in the same vill was pleaded in bar: to which there was a special demurrer, because the acceptance was not laid in *London.*

PER CURIAM. They must lay the acceptance where the feoffment was, it being local; but if it had been a transitory matter, it would not have made it foreign by his plea: and when such plea is local, it ought not to be accepted without *oath* of the truth of it.

The plaintiff had leave to *discontinue* upon payment of costs.

Case 102. **Lamb *against* William.**

Hilary Term, 2. Anne, Roll.

An attorney may enter a *remittit damna*, but not a *retraxit*.

S.C. 1. Salk. 89. 7. Mod. 82. 8. Co. 58. 1. Roll. Abr. 584.

AN action was brought in the court of common pleas upon several damages: the attorney entered a *remittit damna* as to some. And, upon writ of error, it was held that the attorney could well do it, though he could not enter *a retraxit*, for that must be done in person.

Case 103. **Vaughan *against* The Company of Gun-Makers in London.**

A *mandamus* does not lie to the Gun-makers Company to restore a member to the office of "*approver of guns.*"

S.C. 2. Ld. Ray. 989. Ante, 18. 1. Vent. 143. 2. Wils. 11. 2. Stra. 696. 1. Bl. Rep. 667. 2. Burr. 1000. Dougl. 506. 1. Term Rep. 146. 331. 2. Term Rep. 259. 4. Term Rep. 125.

RICHARDSON moved for *a mandamus* to restore *Vaughan* to his place of *approver of guns*, and setting his mark of approver upon the guns made by THE COMPANY.

And he said, that selling guns not marked was a forfeiture of their charter, and that by a bye-law made by them they had appointed him an approver, but had now turned him out.

PER CURIAM. It is a thing in which the publick is no way concerned, nor is there any public law for it, therefore it is out of the reason of a *mandamus*; but your way will be to petition the queen, and she perhaps will order THE ATTORNEY GENERAL to bring a *quo warranto* against them *(a)*.

(a) See ante, 18. 1. Vent. 143. Stamp's Case, 1. Sid. 40. Rex *v.* Guardians of the Poor of Canterbury, 1. Black. Rep. 667. Rex *v.* Bishop of Chester, 1. Term Rep. 396. Rex *v.* Mayor of Colchester, 2. Term Rep. 259.

Morley

* Morley *against* Stacker. Case 10[illegible]

A WARRANT of a justice of peace was given to the defendant to levy money by distress, against one convicted of *deer-stealing*, according to a late act of parliament *(a)* against deer-stealers. If a constable under a warrant of distress, levies and *sells* goods, but afterwards understanding that he had no right to sell, and on the party refusing to indemnify him, he undoes the sale, and restores the money to the buyer, and the goods to the owner, THE COURT will not grant a *mandamus* to compel him to pay the money.

In pursuance whereof he distrained the party's cattle, and sold them for so much absolutely; but before he paid the money, he was advised that it was dangerous for him to sell the cattle, for it was doubtful whether the words of the act warranted a sale: upon this he went to *Morley*, and proffered him the money if he would secure him harmless, which *Morley* refused to do: whereupon he undid the bargain, and restored the money to the buyer, and the cattle to the first owner.

And now *a mandamus* was moved for to compel him to pay the money to *Morley*; and this was the more strongly insisted on, for that they could not charge him in any action without giving the warrant in evidence, which was out of their power in his custody.

And PER CURIAM.—FIRST, It has been solemnly resolved in the case of *The King v. Speed (b)*, that these words in an act of parliament, "*to be levied by distress*," must be understood of "*distress and sale*." A statute directing a penalty to "be levied by *distress*" means by *distress and sale*. Post. 214. 1. Salk. 147. 1. Roll. Rep. 76. Noy, 17. 2. Jones, 25. 1. Brownl. 41.

SECONDLY, That a copy of the warrant would be good evidence in this case. Copy of a warrant good evidence.

THIRDLY, If an officer, who has power to sell, sells upon credit when he may sell for ready money, he is thereby immediately charged to the party for whom the sale was. Goods distrained cannot be sold upon *credit*.

FOURTHLY, That in a doubtful case it is hard to make an officer sell at his peril. Distress in doubtful case.

NOTE, In this case, after the warrant issued out, *a certiorari* was brought, and the record thereby removed up hither, and that could not hinder the execution; as if a *writ of error* come to the court of common pleas after execution sued out, the return of the writ of execution must be in the common pleas; and if goods be taken in execution before the writ of error allowed, after the record is returned here above, a *venditioni exponas* shall go out of the common pleas. A *certiorari* to remove a conviction, issued after the *warrant of distress*, does not supersede the execution. Ante, 33. 40. 43. Post. 206. 208.

FIFTHLY, That if in this case the warrant be not made returnable, the officer is not bound to return it. A warrant of distress need not be returned.

(a) 3. and 4. *Will. and Mary*, c. 10. S. C. 12. Mod. 328. S. C. 1. Ld. Ray.
(b) 1. Salk. 379. S. C. Carth. 502. 583.

SIXTHLY,

Warrant of distress made returnable must be returned, though the conviction be removed.

SIXTHLY, If the justices made the warrant returnable before them, though the record of conviction be afterwards moved hither by *certiorari*, yet they call the constable to account upon the warrant.

If a distress under a penal statute be begun, a removal of the conviction by *certiorari* shall not impede the completion of it; for if wrong, THE SESSIONS may fine the constable if he do not return the *warrant*.

SEVENTHLY, If, before *certiorari* comes, execution be done in part, he may, notwithstanding the *certiorari*, go on with it; as if execution be out of the common pleas, and goods be seized before *writ of error* allowed, notwithstanding the *writ of error*, they may proceed to sale. If this were the case of a sheriff, we would compel him to make a return, and would leave the party to his remedy upon the return: and if a constable will not return his warrant, the sessions may fine him; * which indeed is no remedy or satisfaction to the party; and the mischief is the same in case of a sheriff, for if he will not make a return to a *fieri facias*, the Court can only amerce him.

* [84]

And THE COURT would not grant *a mandamus*, but left the plaintiff to that remedy; for if we should grant *a mandamus*, and he disobey it, we could only fine him for *the contempt*; and the justices of peace may do it as well.

Case 105. Anonymous.

If a release be pleaded, but no *venue* laid, it cannot be amended after demurrer, and joinder entered on THE ROLL. Ante, 38. Post 88.

A RELEASE was pleaded to a *writ of error*, but no *venue* laid to try it; and there was a demurrer, and joinder in it, and all entered on THE ROLL; but THE ROLL was not brought into court, or put upon the book of rolls.

EYRE now moved to amend it.

But PER CURIAM, It cannot be, for it is now a record by being put on THE ROLL; but if it had been *in paper*, it might be amended, upon payment of costs.

Case 106. Lord Banbury *against* Woods.

Pleadings in abatement to a writ of *homine replegiando*.

S. Ik. 5. 6. Mod. 84. 3. Salk. 20. Holt, 41. S. C.

LONDON, *to wit.* } THOMAS WOODS, *merchant*, and *Mary* his wife, were attached to answer *Charles Earl of Banbury* and *Mary Countess of Banbury* his wife, in a plea, why they took the said countess, and her so taken detain, &c. And whereupon the said earl and countess by *Richard Longford* their attorney complain, that the said *Thomas Woods* and *Mary* his wife, on the twentieth day of *April*, in the second year of the reign of our lady *Anne*, now queen of *England*, &c. at *London* aforesaid, to wit, in the parish of *St. Helen* in the ward of *Bishopsgate*, the said countess took, and her so taken do yet hold and detain: wherefore they say they are injured, and have damages to the value of ten thousand pounds: and they bring this suit, &c.

And

And the ſaid *Thomas Woods* and *Mary* his wife, by *Richard Aſh* their attorney, come and crave *oyer* of the original writ aforeſaid, and of the return of the ſame writ; and they are read to them in theſe words, to wit, *Anne*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, queen, defender of the faith, &c. to the ſheriffs of *London*, greeting. Whereas we have oftentimes commanded you, that you ſhould juſtly and without delay replevy *Mary* the wife of *Charles Earl of Banbury*, whom *Thomas Woods* merchant, and *Mary* his wife took, and her ſo taken do detain, as it is ſaid, unleſs ſhe was taken by the ſpecial command of us, or of our chief juſtice, or for the death of any perſon, or for our foreſt, or for any other guilt, wherefore according to the cuſtom of *England* ſhe is not repleviable, leſt we ſhould further hear claim thereof for defect of juſtice; or that you would ſignify to us the cauſe why you would not or could not execute our mandate formerly to you thereupon directed: and you deſpiſing our ſaid precepts, as we have been informed, have not hitherto taken care to replevy the ſaid *Mary* the wife of the ſaid earl, or to ſignify unto us the cauſe why you would not or could not do it; in manifeſt contempt of us and our mandates, and to the great damage and grievance of them the ſaid earl and counteſs, whereat we very much wonder and are moved: ſtill we command and firmly enjoin you, that you replevy the ſaid *Mary* the wife of the ſaid earl, according to the tenor of our ſaid mandates, to you before directed for that purpoſe, or that you yourſelves be before us from the day of *St. Michael* in one month, whereſoever we ſhall then be in *England*, to ſhew why our ſaid mandates ſo often to you directed, you have contemptuouſly refuſed to execute: and have you there this writ. Witneſs Ourſelf at *Weſtminſter*, the twenty-ſecond day of *June*, in the ſecond year of our reign (*Cæſar*). By virtue of this writ to us directed, we do certify, that no other writ or mandate of our ſaid lady the queen, of replevying the within-named *Mary* the wife of *Charles Earl of Banbury*, whom the within-named *Thomas Woods* and *Mary* his wife have taken, and her ſo taken do retain, as within ſpecified, that the writ of *pluries replevin* of the ſaid *Mary* the wife of *Charles Earl of Banbury*, came to our hands, or was delivered to us. And further we do certify to the ſaid lady the queen, that the ſaid *Mary* the wife of *Charles Earl of Banbury* is removed afar off to places to us unknown, by the ſaid *Thomas Woods* and *Mary* his wife, wherefore we cannot replevy the ſaid *Mary* the wife of the ſaid *Charles Earl of Banbury*, as we are within commanded. The anſwer of *Sir Gilbert Heathcote*, and *Joſeph Wolfe*, Eſquire, Sheriffs.

[illegible] Woods.

Which being read and heard, the ſaid *Thomas Woods* and *Mary* his wife demand judgment of the ſaid writ, becauſe they ſay, that by the form of the ſtatute the addition of the village, or hamlet, or place, and county, of the reſidence of the ſaid

Thomas

LORD BANBURY *against* WOOD.

Thomas ought to be contained in the said original writ of the said *Charles Earl of Banbury*, and *Mary Countess of Banbury*, his wife: and this they are ready to verify. Wherefore because such addition is not contained in the said writ, the said *Thomas* and *Mary* pray judgment of the said writ, and that the said writ be quashed, &c.

And the said *Charles Earl of Banbury* and the said *Mary Countess of Banbury* his wife say, that notwithstanding any matter by the said *Thomas* and *Mary* his wife above pleaded in abatement of the writ, the writ of the said earl and countess ought not to be quashed, because they say that the plea aforesaid, by the said *Thomas* and *Mary* his wife pleaded in manner and form aforesaid, and the matter in the same contained, are not sufficient in law to quash the said writ of them the said earl and countess. To which said plea they the said earl and countess need not, neither are they in any manner bound by the law of the land to answer; and this they are ready to verify. Wherefore, for want of a sufficient plea in this behalf of them the said *Thomas* and *Mary* his wife, they the said earl and countess demand judgment, and that the writ of them the said earl and countess may be adjudged good, and that the said *Thomas* and *Mary* may further answer to the said writ, &c.

And the said *Thomas Woods* and *Mary* his wife say, that the said plea by them the said *Thomas* and *Mary* in manner and form aforesaid pleaded, and the matter therein contained, are good and sufficient in the law to quash the said writ of them the said earl and countess, which said plea and the matter therein contained, they the said *Thomas* and *Mary* are ready to verify, as the Court, &c. And because the said earl and countess have not answered to the said plea, nor have hitherto any ways gainsaid it, they the said *Thomas* and *Mary*, as before, pray judgment of the aforesaid writ, and that the same writ be quashed, &c.

But because the Court of the said lady the queen now here is not yet advised of giving their judgment of and concerning the premises, day is therefore given to the said parties before the lady the queen, until . . . . . wheresoever, &c. of hearing their judgment of and concerning the said premises, because the Court of the said lady the queen now here, is not yet thereof, &c.

Case 107.

Lord Banbury *against* Wood.

Michaelmas Term, 2. Anne, Roll 398.

The defendant's *addition* need not be mentioned in a *pluries homine replegiando*; for the *original* writ is *vicontiel*, and as such writs do not require addition, it need not be in the *alias* or *pluries*. S. C. 1. Salk. 5. S. C. 3 Salk. 20 S. C. Holt 41 S. C. 2. Ld. Ray. 987. Post. 115. 198. Cro. Eliz. 897. Noy, 135. 4. Mod. 347. 12. Mod. 199. 211.

A HOMINE REPLEGIANDO. The want of *addition* to the *pluries* was pleaded in abatement; and on demurrer

The question was, Whether this was within the statute of 1. *Hen.* 5. c. 5. of additions.

And

And that it was, it was urged, that process of *exigent* lies upon this writ; therefore it is within the very words of the statute. The *exigent* lies here, and did so at common law; though it be not expressly *vi et armis*, yet it is impliedly so, for it is a trespass and false imprisonment. It lies in a *writ of deceit*, though it be not *vi et armis*, upon the same reason (*a*). And the reason why *writs of replevin* in THE REGISTER are without *addition*, is, because that book is much more ancient than the *statute of additions* (*b*). But if it be objected, that there was no *capias* in *replevin* until 25. *Edw.* 3. c. 5. and 17. I answer, so it did not lie in *debt* or *covenant* until given by acts of parliament, and yet there must be addition. Lord [illegible] against Woods.

HOLT, *Chief Justice*, at first inclined strongly, that the plea was good, and would distinguish this from other *writs of replevin*; for here, he said, the process of outlawry issues immediately upon the *pluries homine replegiando*, which he affirmed to be *a withernam* in itself; but in *common replevin* the process of outlawry is not upon the *pluries replegiar.*, but upon the *capias in withernam*, which issues upon the sheriff's return of *averia elongat.* upon the *pluries*; and upon the sheriff's special return of the *capias in withernam*, that is, upon the sheriff's return of *nulla bona* on the *withernam*, there shall go a *capias* against the person, and so to outlawry.

But POWELL, *Justice*, *contra*. There is no difference; for in both cases the process of outlawry is upon the *withernam*, and not upon the original writ; for in a *homine replegiando* there shall go no * *withernam* until return of the *homine replegiando*; and as the first *withernam* in *common replevin* must be *de averiis*, so the first in a *homine replegiando* shall be of the person. * [85]

And at another day THE WHOLE COURT awarded a *respondeat ouster*; for though process of outlawry lies in a *homine replegiando*, yet there ought to be no *addition*, for the *pluries* on which we hold plea here, is not the original in *replevin*, but the original is the *writ of replevin*, which writ is *vicontiel*: so if *replevin* be removed by *recordare*, though, upon *withernam* thereon, there will lie process of outlawry, yet there is no addition according to the statute; therefore it is not the original, and therefore out of the statute.

SECONDLY, There being no *addition* to the first *replevin*, the *pluries*, which is indeed an original to us, must have none, because it must not vary from the first writ; and the statute of 1 *Hen.* 5. c. 5. is to be construed strictly. In an *assise*, if the *disseisin* be found with force, there is *a capiatur* against the defendant, and process of outlawry thereupon; yet because it is mixed, and not a personal action, it is out of the statute. 1. Salk. 6.

(*a*) See Year Books 11. *Hen.* 4. pl. 835. 35. 25. *Hen.* 6. pl. 6. and 2. Roll. Abr. (*b*) See 2. Inst. 595. 665.

And

LORD FANBURY against WOODS.

And POWELL, *Justice*, said, There never is an *addition* to any writ that is *vicontiel*.

PER CURIAM. *Respondeat ouster*.

Case 108. Inman *against* Crew.

An attorney of B. R. or C. B. must be present when a person in custody gives a *warrant of attorney*. Post. 163. 1. Salk. 402. 5. Mod. 144. Ld. Ray. 345. 598. Stra. 530. 807. 882. 902. 1245. 1. Bac. Abr. 188.

THE doubt was, Whether it be necessary that AN ATTORNEY should be present at the executing of a warrant to confess judgment by one under arrest by process of an inferior court?

And it was agreed,

FIRST, That if one under arrest confess a judgment in this court in presence of a sworn attorney of the common pleas, it will be well, and so *vice versâ* (*a*).

A warrant improperly obtained, shall be set aside.

SECONDLY, That though an attorney be present, yet if there be practice in obtaining it, it will be set aside (*b*).

Attorney need not be present if the person be under arrest by process of *inferior court*.

THIRDLY, If one under arrest by process of an inferior court, give a warrant for the confessing of judgment in that court, we will not set it aside, though an attorney be not present.

Attorney must be present if the judgment is confessed in superior court.

FOURTHLY, If one under an arrest by such process give a warrant to confess a judgment in this court, if an attorney be not present, it will be ill (*c*).

A warrant obtained without an attorney under a colourable discharge, is bad.

FIFTHLY, If a man be under an arrest, and seemingly discharged by the bailiffs, with a design that he should give a warrant of attorney to confess a judgment, to stand though no attorney were present, and to retake him in case he did not, gives a warrant for confessing of judgment, it will be set aside.

A warrant of attorney given under apprehension of being in custody is bad, if no attorney be present.—Post. 163.

SIXTHLY, Though such person be really discharged, yet if he have probable reason to believe himself not to be discharged, and under such apprehensions he give a warrant for confessing of judgment, it will be set aside. So if under the terror of an arrest.

(*a*) Bland *v.* Pakenham, Stra. 530.
(*b*) Dougl. 198. (186.)
(*c*) 5. Com. Dig. "Pleader," (Y. 2.)

*[86]

Case 109. * Wigg *against* Rook and his Wife.

If an attorney undertake to appear, and accept a declaration *de bene esse*; the plaintiff, on the attorney's refusing to appear, cannot sign judgment for want of a plea. Ante, 16. 42.—1. Roll. Abr. 747. 1. Salk. 86.

THE case upon the report of MR. CLARKE *the secondary*, was thus: A writ issued against husband and wife; and an attorney, on sight of the writ, undertook to appear for them, but after would

not do it: the plaintiff delivered a declaration, which *he* received *de bene esse*, and judgment was entered for want of a plea.

THE COURT set aside the judgment for *irregularity*, but ordered THE ATTORNEY to be laid by the heels.

AND IT WAS SAID, That if an attorney undertake to appear, and afterwards will not do it, upon summons before a judge, he shall be compelled to do it; for that an attorney to undertake to appear, and not to do it after, is *a contempt* of the Court.

Root and Wife.

An attorney who undertakes, may be compelled to appear. 5. Com. Dig. "Pleader," (B.) (B. 3) 2. Lev. 38.

In an action against husband and wife, if the husband will order an appearance for himself, it will not be received without an appearance for the wife too (*a*).

In an action against husband and wife, the *husband* must file appearance for his *wife*. Ante, 17 Post 105—1 Lev 216 2 Bl. Rep. 720. 1. Salk. 115. 2. Stra. 1272. 1 Term Rep 486 5 Com Dig "Pleader," (B 4)

(*a*) See Clark *v* Norris and his Wife. 1. H Bl. Rep. 235.

Jevon *against* Turner. Case 110.

TWO *scire facias* were taken out with the same *teste*, but different returns; the one returnable in *quindena Hilarii*, and another *crastino Purificationis*.

Two *scire facias* of the same *teste* ill.

Carth. 468.

Though there were different returns, and at convenient distance, yet because they were actually taken out at one time, IT WAS JUDGED wrong; for PER CURIAM, Thus the party would lose the benefit of two *scire facias*, which the law gives him.

Anonymous. Case 111.

A SCIRE *Facias* to revive a judgment against an executor, mentioned first a day of appearance *coram nobis ubicunque*; but after gave day to the party to appear "*at the day aforesaid at* "WESTMINSTER."

Where the first *scire facias* returnable *ubicunque*, the second *ad diem apud Westm*.

It was now moved to amend it.

But THE COURT said, that it being in the writ, they could not do it of grace or favour, but would give day to shew cause why it should not be amended, *ex merito justitiæ*.

And the plaintiff for his expedition moved to quash it.

Horner *against* Bonner. Case 112.

PROHIBITION was moved for upon the statute of 2. & 3. *Edw.*6. c. 13. for suing for tithes of barren ground newly cultivated.

But IT WAS DENIED for two reasons:

Prohibition for tithes of barren ground newly cultivated, refused.—S. C. Post. 96 2 Ld. Ray. 991. Bunb. 159. 2. Inst. 656.

FIRST,

HORNER against BONNER.

FIRST, Because the suggestion did not alledge it to be *suapte natura sterilis*.

SECONDLY, That there was no affidavit that it was pleaded below.

Case 113. Anonymous.

If party die after warrant to confess judgment, &c.
8. Mod. 77.
2. Barnes, 212. 223.

PER CURIAM. If a man give a warrant of attorney to confess judgment the first day of Term, and die, it may be well entered any time that Term, according to *Shelly's Case* (*a*), and the *Dean of Salisbury's Case* (*b*), and many other cases.

(*a*) 1. Co. 93. (*b*)

Case 114. Anonymous.

An indictment will not lie for selling ale without licence.
1. Salk. 134.
Show. 398.
3. Mod. 144.
7. Co. 36. Ld. Ray. 682. 10. Mod. 337. 12. Mod. 104. 446. Fitzg. 47. 65. Stra. 828.
2. Burr. 801, 834. 2. Hawk. P. C. c. 25. s. 4. 2. Hale, 171.

IT was said to have been resolved in the case of *the Queen v. Watson* (*a*), two years ago, in this court, and also in one *Castle's Case* (*b*), that where an act of parliament gives a *particular penalty*, the party shall not be punished by *indictment:* in this case, the *indictment* was for selling ale without licence, and it was quashed *nisi* (*c*).

(*a*) 1. Salk. 45. See 2. Burr. 803.
(*b*) Cro. Jac. 643. See 2. Burr. 803.
(*c*) See the case of Rex *v.* Marriott, 1. Show. 398. 402. S. C. 4. Mod. 144.

*[87]

Case 115. * The Queen *against* Glin and Another.

Justices of peace cannot delegate their authority to others, to make rates and orders, &c.
S. C. Sett. & Rem. 217.
Ante, 77.
Post, 97.
1. Roll. Ab. 382.
2. Salk. 436. 489. 493. 674. 699. 701.
2. Hawk. P. C. ch. 1. s. 9.
1. Bott's P. L. 312. pl. 381.
Ld. Ray. 55.

THE defendants were indicted for not producing the parish books of rates (*a*) before certain justices of peace appointed by the rest to examine and make orders thereupon, and for disobeying such orders.

And it was excepted, that this was a delegation of their authority, which they could not do; for though it were agreed, that they might appoint some of themselves to examine and state the matter to them, and then they to make order thereupon, yet sure they cannot delegate the power of making orders.

A SECOND EXCEPTION was, that notice of the order was not alledged.

HOLT, *Chief Justice*. I am not satisfied that they can ever refer the examination of the matter to a certain number of themselves, because they are all judges of the fact, and therefore they transact it as judges in court; but allow that they may refer the

(*a*) See 17. Geo. 2. c. 38.

examination

examination of the fact, and reserve the judgment to themselves, yet doubtless they cannot give a power to make rates and orders.

And it was quashed.

The Queen against Glin and Another.

The Parish of Cunmer *against* The Parish of Milton. Case 116.

A CHILD was born at *Cunmer*; and the father, while the child was under seven years of age, removed to, and gained a settlement in *Milton*; and THIS WAS HELD a settlement for the child.

A *child* follows his *father's* settlement.
S.C. 2. Salk. 528
S.C. 3. Salk. 259
S.C. Holt, 578.
S.C. Sett. & Rem. 239 242.
S.C. Fort. 322.

And it was said by THE COURT, that if a father be settled in a parish, and dies, and after his wife dies in childbed, he shall be there settled.

Bennoyer's Case. Case 117.

PER CURIAM. If proceedings be *ex officio* in the spiritual court; yet if they do not give a copy of *the articles*, they shall be prohibited *quousque*; notwithstanding the resolution in *Moore*.

A prohibition lies, if the spiritual court refuses a copy of articles.
Post. 308.

And THE COURT granted prohibition.

1. Show. 158. 172. 1. Roll. 80. 2. Roll. 318. 1. Sid 65 332. 7. Mod. 148. 1. Vent. 5. Hard. 364. 6. Com. Dig. "Prohibition," (F. 15.)

The Queen *against* Browne. Case 118.

BROWNE was indicted at *Hull* for forging a cocket for *quinque sarcinas lini*, ANGLICE *five packs of linen cloth*; and this was removed up by a *certiorari*.

An indictment for forging A COCKET for *five packs of linen cloth* is sufficiently certain.

And, after trial, a motion was made in arrest of judgment, for that it was too uncertain.

S.C. 3. Salk. 172.
Hard. 111.
1. Salk. 130 283.
2. Salk. 654.
2 Term Rep. 709.

But it was urged that much stronger cases than this have been adjudged good, as "*duas sarcinas canapis*, ANGLICE, *two bundles of hemp*" (*a*), for "a parcel of thread" (*b*), "trover for a study of books" (*c*), for it is enough sufficiently to describe the thing in which they were contained.

HOLT, *Chief Justice*. Detinue lies for "a box of writings," and if any of them concern lands, it will be prudent to name it, for that shall oust the defendant of his *wager of law*; but it suffices that the thing in which they are contained be certain enough; and if any new action be brought, the defendant shall say, that a former action was brought for the same by the name of so many bundles, &c.

And THE QUEEN had judgment.

(*a*) 2. Lev. 125.
(*b*) 1. Lev 303.
(*c*)

Case 119. * Garden *against* Exon.

A defendant shall not have *costs* upon a judgment in his favour on a *demurrer* to a plea in *abatement*.

S.C. 1. Salk. 194.
S. C. 2. Ld. Ray. 992. Post. 198.

PER CURIAM. There shall be no costs for a defendant upon judgment upon a *demurrer* to a plea in *abatement*; for the statute 8. and 9. *Will.* 3. c. 11. f. 2. is to be intended of a judgment upon demurrer upon the merits of the case; for if there were judgment of *respondeas ouster* for plaintiff, he should have no costs; *ideo a pari*: and the case of *Thomas v. Lloyd* (a) was quoted, where the same had been resolved before.

(a) 1. Salk. 194. S. C. 1. Ld. Ray. 336 Same point, 12. Mod. 523. 609 Gilbert's C. P. 268. See also Hullock on Costs, 149. 3. Com. Dig. 3d edit. 242. Cook *v.* Sayer, 1. Burr. 753. Astley *v.* Young, 2. Burr. 1232. Yates *v.* Gurner, Barnes, 141. and Thrale *v.* Bishop of London, 1. H. Bl. Rep. 530.

Case 120. Anonymous.

Wife indicted by husband, admitted *in forma pauperis*.
Stra. 1041.
4. Com. Dig. "Forma Pauperis," (A.)

A *FEME COVERT* was indicted by her husband for poisoning his cows with bruised glass put into their grains; and she was admitted *in forma pauperis*; though THE COURT said, the husband could not convict her.

Case 121. Anonymous.

It is a contempt to charge a prisoner, in execution for *a fine*, with a *civil action* without leave of Court.

PER CURIAM. If a person be in execution for *a fine*, it is *a contempt* for any to charge him with *a civil action* without leave of the Court; but the Court will hardly discharge the action, though they will punish the contempt.

Case 122. Anonymous.

Order of removal.
2. Salk. 491. 514.

PER CURIAM. It is a good cause in an order of removal to say, that the party is "*likely to become chargeable* to the "parish" (a), or that "he does not rent a tenement of ten pounds "a-year" (b).

(a) The pauper being likely to become chargeable, must be in the *adjudication* of the order, and not in *the recital* only, except so averred by the justices, The Queen *v.* the Inhabitants of Rockville, Trin. 12. Ann. Sett. & Rem. 15. 2. Bott P. L. 775. It must be directly so averred; "THEREFORE are likely to "become chargeable, *as we are creditably* "*informed*," is ill, Rex *v.* Great and Little Waltham, Hil. 1711. Sett. & Rem. 24. 2 Bott, 774. So "WHEREAS "*J. S.* is likely to become charge-"able," not saying to what *parish*, is ill, The Queen *v.* the Inhabitants of Bradford, Trin. 1711. Sett. & Rem. 1[illegible]4. "Whereas *J. S.* intruded into *Heyden*, "and was last legally settled at *Heydon*," is ill, it not being said he was likely to become chargeable, Hil. 1712. NOTE *to the former edition.*

(b) As to the point of renting ten pound *per ann.* see Rudwick and Cheddingford, Mich. 1710. Rex *v.* the Parish of Farnham, in the same Term. Rex *v.* the Parish of Sedgemore, Easter T. 1711. Rex *v* St. Saviour's Southwark, Mich. 1714. Rex *v* North Dibley, Sett. & Rem. 86. 2 Bott P. L. 165. Rex *v.* St. Mary Guilford and Cranley Hill, 1721. Stra. 502. Rex *v.* St. John's Ampwell, Trin. and Mic. 1722. Stra. 529. NOTE *to former Edition.*

Anony-

Anonymous. Case 123.

PER CURIAM. The justices may remove any man that does not rent ten pounds a-year, let him be worth ever so much; for his having *a freehold* of his own is foreign; and if he has any, it ought to come of his side upon the appeal (*a*). A pauper cannot be removed from his *freehold*.

(*a*) But see Rex *v*. St. Mary, Berkhamstead, 2. Bott P. L. 629. and Rex *v*. Aythorp Rooding, Burr. S. C. 412. 2. Bott P. L. 634. and the statute 9. *Geo*. 1. c. 7. 2. Bott P. L. ch. 10. page 623 to 697.

HILARY TERM,

The Second of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir John Powell, *Knt.*
Sir Thomas Powis, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Esq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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*[89]

Case 212.

* The Queen *against* Guy.

A MANDAMUS was directed to the official of ——— to *swear in A.* and *B.* churchwardens of the parish of ——. To this a return was, that they were "*not duly chosen*" (*a*).

A *mandamus* lies to the spiritual court to swear in churchwardens; and it cannot be returned that they were not *duly elected*; but if there is matter of doubt, a *special return* must be made.

And now a rule was made for a *peremptory mandamus*, for he should have complied with the writ as far as he could, and have sworn one of them, if the truth were that one of them only had been duly chosen, or else have returned that neither of them was chosen.

But it was objected, that this could not be done; for by the custom of the parish the parson was to chuse one, and the parishioners the other: and the parishioners insisted on it, that they should chuse two, and did propose two, and the official could not tell which of them two to swear.

S C. 3. Salk. 88. S C 2 Ld.Ray. 1008. Post. 97. 1 Vent 267. 7 Mod. 83.

2. Salk 431. Cro Car. 551 1 Lev 75 1. Ld. Ray. 138. 559. 2. Ld Ray. 1200. Stra 225. 8 Mod 338. 10 Mod 12 22. 11 Mod 221. 12 Mod 116 Stra. 52 225. 609. 686. 1246. B R. H. 130. 3 Burr 1422 5 Com Dig. "Mandamus" (D. 5.). Dougl. 79. 86. 1. Bac. Abr. 371. Cowp 413. 2. Term Rep 456.

(*a*) See Rex *v* Lyme Regis, Dougl 79. to 86.

THE QUEEN *against* GUY.

HOLT, *Chief Justice.* Then you should have made a *special return*, that the parish claims a right to chuse two; that these persons had an equal number of voices; that the parson had chosen his man, and so you could not swear either of the parishioners' men: or if the parish unanimously chose two jointly, when in truth they had a right but to chuse one, that would be void as to both; and in that case you might return generally, that neither of them had been chosen; and so where two have an equal number of votes.

And at last, by direction of THE COURT, it was consented to, to try *the custom* in a feigned action.

*[90]

Case 221. * ——— *against* Cowper, a Justice of Peace.

The Court will not hear affidavits against a return to a *certiorari*; unless to prove *corruption* in the magistrate; but if the return be *false*, the party may bring an action on the case.
Ante, 30.
Post. 114. 169. 378.
Stra 63.
2. Hawk. P. C. ch. 27. s. 74..
1. Bac. Abr. 357.

AN inquisition of forcible entry was removed hither by *certiorari*, commanding the justices to send all inquisitions of forcible entries made upon *J. S.* and the justices returned an inquisition of an entry made by *B.* upon *J. S.*

And now affidavits were offered to give the Court satisfaction, that the only inquisition before the justices was an inquisition of a force by *A.* and that the precept was to summon a jury to inquire of a force against *J. S.* by *A.* and that they did not inquire of any other force.

PER CURIAM. We cannot hear affidavits against the return, which is matter of record, in order to make *restitution*; but we may do it in order to have an information filed against the justices for this abuse: or, if the return be false, you may have your action of false return.

And here a day was given to shew cause why AN INFORMATION should not be filed against them.

An inquisition of forcible entry from a copyholder must find that it was *demised* and *demisable* at the will of the lord.

HOLT, *Chief Justice*, took this exception to the inquisition, that it alledged the party to be seised in fee of a customary estate *ad voluntatem domini*, but did not say *dimiss' et dimissibil'*.

Case 126. Garibaldo *against* Cagnoni.

It is a *contempt* knowingly to procure the arrest of persons going to court to plead to an indictment
S. C. post. 266.

GARIBALDO came to court to confess an indictment for an assault upon *Cagnoni*, and as he was going home *Cagnoni* got him arrested for the same assault.

Upon motion and affidavit of this matter, AN ATTACHMENT *nisi* was granted against him, and before the day he discharged *Garibaldo.*

S. C. 1. Salk. 102. S. C. Holt, 89. Post. 96. 173. 1. Vent 11. 2. Mod. 181. Comy. Rep. 411. Strange, 986. 1094. 6. Com. Dig. "Privilege," 475. 1. Bac. Abr. 182. Cowp. 156. 4. Term Rep. 377. 1. H. Bl. Rep. 636.

And

And now coming to ſhew cauſe, the rule was ſet aſide, becauſe the affidavit did not charge him to have *notice* that *Garibaldo* came to court to confeſs the judgment, for otherwiſe he could not be in contempt for the arreſt.

GARIBALDO *againſt* CAGNONI.

Catchmade's Caſe. Caſe 127.

PER CURIAM. If a contract be for four pounds, and a plaintiff, to give an inferior court juriſdiction, will ſplit it into ſeveral actions, *a prohibition* ſhall go.

A debt of *four pounds* cannot be ſued for by *ſeveral actions* in an inferior court. 1. Sid. 464. Hob. 617. 1. Vent. 65. 73. Co. Lit. 118. a. 5. Term Rep. 64.

* The Queen *againſt* Corbett. Caſe 128.

THE juſtices of peace made an order upon the defendant, that he ſhould pay *B.* ſo much money for labour and work done, without ſo much as ſaying that he was his ſervant.

And it was quaſhed: for, PER CURIAM, this might be carpenter's work, &c. and the juſtices have only power in caſes of wages of ſtatutable ſervants (*a*), *viz.* ſervants in huſbandry: and they would be very tender of quaſhing ſuch orders (*b*).

An order of juſtices to pay ſo much money for work and labour generally is bad. S.C. 3. Salk. 261. S. C. Sett. & Rem. 229. Poſt. 204. 1. Salk. 406. 2. Salk. 475 680. 5. Mod. 419. Carth 156. 1. Strange, 2. 8. Forteſ. 317. 2 Stra. 1002. 4. Com. Dig. "Juſtices of Peace" (B. 60.).

(*a*) See 5. Eliz. c. 4. ſ. 15.

(*b*) See the caſe of Reg *v.* Gouche, in Michaelmas Term, 1. *Anne*, where the juſtices made an order for the payment of wages for work and labour in huſbandry, and on an exception that it did not appear to be ſtatute wages, the Court ſaid, they would, in all orders of the kind, intend it within the ſtatute, unleſs the contrary appeared on the face of the order, 2 Salk. 441. See alſo Rex *v.* Gregory, 2. Salk. 484. Rex *v.* Pope, 5. Mod. 419. and Shergold *v.* Holloway, 2. Stra. 1002. And in the caſe of Rex *v.* Helling it appears, that an order generally for *wages* is not good, 1. Stra. 8. for it muſt appear to be for wages in huſbandry, 1. Stra. 475. the caſe of the King *v.* Clegg. And if it appear to be not for wages in huſbandry, it is clearly bad, Rex *v.* L[illegible]n, poſt. 204. Rex *v.* Pope, 5. Mod. 419.

Sutton's Caſe. Caſe 129.

SUTTON had been marſhal of the court, and for non-attendance another was ſworn into his place, but (as the Court declared) without prejudice to his right to the office, for that was left to the law. The new marſhal, to get poſſeſſion, made a forcible entry into the priſon.

BROTHERICK moved in behalf of *Sutton*, that the Court, in regard of the power they had over their officer, would interpoſe, and quiet the poſſeſſion until the title were legally ſettled; and the rather, for that it would look diſreſpectful in him to apply to an inferior juriſdiction to have an inquiſition of *forcible entry*, and that the juſtices would hardly dare to meddle in it by reaſon of its immediate dependency on the Court: and though a new marſhal were

If THE MARSHAL be turned out for non-attendance, and the new marſhal get poſſeſſion *by force*, the Court will not reſtore him on motion. S. C. Ante, 57. S. C. 12. Mod. 557. S.C. 2. Ld. Ray. 1005. Dyer, 114. 1. Salk. 2. 7. Mod. 50.

SUTTON'S CASE.

sworn in, yet the former was liable to all escapes of prisoners charged in his custody, and doubtless they would be many in this disorder.

CURIA. It cannot be disrespectful to us, that any should use the remedy the law gives him. And here you would have us hold plea of forcible entry by parol, whereas the Court has no original jurisdiction of forcible entry: *et currat lex*, for it is a question of right between two contending officers. And as to the inconveniency of escapes, the Court said, that he was so used to suffer voluntary escapes, that they could not imagine he feared any danger that way.

*[92]

Case 130.

Jenkins and his Wife *against* Plombe.

If a wife be made executrix, and husband and wife bring an action *as executor* for money had and received to their use in right of the wife *as executrix*, yet they shall pay *costs* on being *nonsuited*; for the receipt being since the death of the testator, the cause of action arose in their own time, and it was not necessary in this case to name the wife executrix.

S. C. post. 181.

S.C. 1.Salk.207.

S.C. 3.Salk.105.

S. C. Holt, 313.

S. C. 11. Mod. 174. Ld. Ray. 224. 443. 477. 865. 1413. 12. Mod. 440. Savil, 133. 1. Salk. 207. 314. 3. Salk. 106. Hutton, 79. 11. Mod. 135. B. R. H. 205. Bull. N. P. 332. 1. Wils. 172. 1. Bac. Ab. 518. 2. Term Rep. 477. 4. Term Rep. 281. 277.

INDEBITATUS by husband and wife executrix, declaring, *quod cum* the defendant was indebted to them as *executor* of *J. S.* for so much money received by him to their use *as executor*, and that he promised to pay it, &c.; the defendant pleaded *non assumpsit*; and at trial the plaintiffs were nonsuited.

The question was, Whether they should pay *costs* upon the statute of 23. *Hen.* 8. c. 15.?

DARNELL, *Serjeant*. They shall pay costs; for this action is brought by them in their own right, and upon a * contract with themselves, *viz.* the receipt of the money to their use, and in which they ought not, at least they need not, to name themselves executors; and the naming the plaintiff executor when it is not of necessity, shall not exempt him from paying costs (*a*). And for a foundation to this distinction he relied on THE YEAR-BOOK of *Henry the Seventh* (*b*), where the difference is taken between an action brought upon the executor's own possession and where upon the possession of his testator; and upon this he would reconcile the cases of *Bull v. Palmer* (*c*), *Mason v. Jackson* (*d*), and *Gale v. Till* (*e*). If an executor bring *trover* for a trover and conversion in the time of his testator (*f*), or upon a trover in the time of his testator, and a conversion in his own time (*g*), he shall not pay costs: so

(*a*) See Latch, 220. Hutton, 78.

(*b*) 2. *Hen.* 7. pl. 15.

(*c*) 2. Lev. 165.

(*d*) 3. Lev. 60.

(*e*) 3. Lev. 375. S. C. 4. Mod 245.

(*f*)

(*g*) See the case of Cockerell and his Wife, executrix of Moody, *v.* Knyaston, in Easter Term, 31. *Geo.* 3. in *trover* for goods: the FIRST COUNT stated the trover and conversion to have been in the life-time of the testator; the SECOND COUNT stated the trover in the life-time of the testator, and the conversion afterwards; and the THIRD COUNT was for a trover and conversion after the death of the testator: and at the trial the plaintiffs were *nonsuited*: the only evidence at the trial was applicable to the first count; and the Court held that the plaintiffs in this case were not liable to costs. 4. Term Rep. 277.

upon

upon an *insimul computâsset* with the executor for debt due to the testator, the executor shall not pay costs (*a*). JENKINS AND HIS WIFE *against* PLOMER.

HOLT, *Chief Justice*. If the receipt were since the testator's death, and by appointment or consent of the executor, there the action must have been brought by him not as an executor; for the receipt by his appointment is a receipt by himself. Then if the receipt be without the executor's previous appointment, yet the bringing of this action is an assent to the receipt, and makes it a receipt in his own right; so that in either case the debt ought to be looked upon as a new debt, contracted since the death of the testator. And this receipt must be intended to have been in the executor's own time, because the receipt is laid to have been to the executor's use; and he concluded that there was no room for the executor here to declare as executor: if there be a receipt by the appointment of an executor, it is immediate assets in the executor's hands, and by bringing this action it is so in the same manner. 1. Vent. 109. If an executor or an administrator bring *trover* upon their own possession, they shall pay costs. Yet there, if the administrator call himself administrator, and it is so entered on the record, and he has judgment, and afterwards the administration is repealed, the defendant would be relieved by *audita querela* (*b*), because it would appear on the face of the declaration that he had been sued under that now repealed administration. And the naming himself executor here is not of necessity, any farther than to shew how the original right Jones, 170. came. If an executor account with the testator's debtor, indeed thereby a new action accrues, but still it is in the right of the testator, and no new contract is made, but only an ascertaining of what was due before. If judgment and execution be in the testator's life, and an escape in the executor's time, upon a nonsuit in an action by the executor for this escape, he shall not pay costs; but if he had judgment and execution in his own time, and an escape had happened, for which he had brought an action and been nonsuited, he should have paid costs.

POWELL, *Justice*. Where the thing sued for is *assets* in the 1. Vent. 109, executors or administrators before recovery, there they shall pay 110. *costs* upon the *nonsuit*; or when the entire cause of action arises in his own time.

And IT WAS AGREED to have been adjudged, that in an action for rent accruing in * an executor's own time, if the executor be * [93] nonsuited, he shall pay costs; so also that in an action on a covenant with the testator, and a breach in the time of the executor, he shall pay costs on being nonsuited.

Quære per me, If there be any difference upon this account Hob. 253. between covenant for rent upon a covenant made with testator, and debt for rent upon a lease with him?

And it was agreed by THE WHOLE COURT, that the statute does not, by the words thereof, distinguish the case of an executor

(*a*) (*b*) 1. Bac. Abr. 198.

from

JENKINS AND HIS WIFE *against* PLOMER.

from any other case; but that it was by an equitable construction resolved so by the Judges for this reason, because the nature or cause of action does not lie in their privity or knowledge.

And HOLT, *Chief Justice*, said, that it has been held, that if the plaintiff's declaration were so bad, that the plaintiff, in case he obtained a verdict, could not have judgment, there, if he were nonsuit, he should pay no costs; and therefore this action being by husband and wife upon the possession of the husband only, so as if there had been a verdict, he could not have had judgment, he could have no costs: but he said the contrary had been resolved (*a*).

Hob. 80. The case being moved again to-day, the case of *Elwis v. Mocato* (*b*) in this court, in *Easter Term*, in the second year of *Queen Anne*, was quoted for the plaintiff; which was several counts by a plaintiff executor, one whereof was an *insimul computasset*, and, on being nonsuited, the Court held, that he was not liable to costs; which case was now again agreed, because there was no new cause of action, but a new action upon an ascertaining of an ancient cause, which ascertaining leaves it still a debt of the testator's (*c*).

IT WAS AGREED now by the Court, that the case in THE YEAR-BOOK of *Henry the Seventh* (*d*) is a good foundation for this case; for there it is agreed, that a *feme* executrix cannot give the goods of her testator away without the consent of her husband, and if he consent to it, then it is he that gives them; so the wife here cannot appoint one to receive this money, but if the husband consent, then it is his appointment. And if an executor appoint another to receive a debt of his testator, and he receive it, it is now the same thing as if he had actually received it himself, and will be *assets* in his hands; and, by consequence, appointing another to receive who will not repay, is a *devastavit*.

HOLT, *Chief Justice*, strongly inclined, that the bringing of this action was such a subsequent agreement as would make it *assets* in his hands from that time, by the rule of *omnis ratihabitio retrò trahitur, et mandato seu licentiæ equiparatur* (*e*). But he agreed, that no more would be *assets* in his hands than he recovered, and not as much as was received or declared for, and even for that he would not be liable until after judgment; but immediately after judgment, and before execution, he is liable: whereas where one sues as executor, though he has judgment, yet until execution the thing recovered is not *assets* in his hands. And as if the husband had actually appointed the defendant to receive, he alone ought to bring the action in his own name; so here the

(*a*) Hob. 219. 284. 1. Cro. 175.

(*b*) 1. Salk. 314. 7. Mod. 48.

(*c*) See Marsh *v.* Jennedy, And. 359. and Goldthwayte *v.* Petrie, 5. Term Rep. 234. where this case is denied to be law.

(*d*) 2. *Hen.* 7. pl. 15.

(*e*) Co. Lit. 206. 245. 9. Co. 106. 4. Co. 30. Plowden, 8. and Wingate's Maxims, 485.

ratihabition

ratihabition amounting to *an appointment*, he ought to bring it alone: as if a man enter into my land, and take the profits thereof, I may, if I please, * charge him in account as my *bailiff*, though there never was any privity between us until the action brought. And where it was objected, that if the bringing of the action should amount to *an appointment*, then by bringing the action the whole would be assets in his hands before any recovery, he answered, that would not follow, for they being nonsuit, the matter is set at large again, and he has liberty to sue the original debtor; but if he had had judgment, and no execution, or ever like to have any, yet his bringing the action, and having judgment, would discharge the first debtor, and by consequence be a *devastavit* in him; for by the judgment he makes the defendant his debtor, who never owed any thing to the testator. And he quoted the case of *Norden v. Levit* (*a*), which was this: An executor brings *trover* for a conversion in the life of his testator, and, the party being arrested and insolvent, he takes a covenant from him for the payment of so much money in satisfaction; and it was held, that forasmuch as this extinguished the original cause of action, it was an immediate *devastavit*; which judgment was affirmed by the house of lords; *à fortiori*, the extinguishing of the original debt by judgment against the present defendant would, in this case, be a *devastavit*, and upon judgment given, not the administrator *de bonis non*, but the administrator of the executor, should sue execution. If an executor lose the testator's goods out of his possession, and declare that he was possessed of so much goods as the executor to *J. S.* and upon the evidence it appears that they were his own proper goods, he shall be nonsuited, and pay costs (*b*). If one as administrator bring trover upon his own possession, and is nonsuited, he is condemned in costs, but after administration is revoked, he shall, by *audita querela*, be relieved against the costs. And this was the case of *Turner v. Davis* (*c*), in the thirteenth year of *Charles the Second*. And it was laid down for a rule, that where an executor brings an action in which he need not name himself executor, there, if he be nonsuit, he shall pay costs (*d*).

Jenkins and his Wife against Plomer.

* [94]

Hob. 3

1. Vent. 119. contra. Post. 181.

1. Mod. 62. 2. Saund. 148. 3. Keb. 668.

But Powell and Gould, *Justices*, seemed *contra*, for this was an action to make *assets*, and not for the recovery of what is so already; and immediately after the receipt there was no *assets* accrued to the executor.

But Holt, *Chief Justice*, said, that in the case *Pearce v. Steer*, reported in *Croke* (*e*) to be three against one, as it is in *Hutton* (*f*), is two to two: however, he was of opinion that there ought to be no *costs*, for the ward never came to the actual possession of the exe-

Hutt. 78. Jac. 229. Cro. Jac. 229. 361. Cro. Eliz. 403. 3. Lev. 60. 2 Vent. 109, 110. contra.

(*a*) *Easter* Term 29. *Car.* 2. in the king's bench. 1. Freem 442. S. C. 1. Eq. Abr. 240. S. C. 2. Jones, 88. S. C. 3. Keb. 597. 615. 691. 706. 742. 778. S. C. 2. Lev. 189.

(*b*) Hutton, 214. 220.

(*c*) 1. Mod. 62. S. C. 2 Saund. 148. S. C. 3. Keb. 668.

(*d*) Cro. Jac. 229. 361.

(*e*) Cro. Car. 29.

(*f*) Hutt. 78.

cutor,

JENKINS AND HIS WIFE *against* PLOMER.

cutor, and could not therefore be *assets* in him: as if a testator's goods be taken and converted after the death of the testator, before they come to the actual possession of the executor, they are not *assets*; and therefore if he be nonsuit in *trover* for them, it were hard to make him pay costs.

Et adjournatur (*a*).

(*a*) THE COURT, after taking time to consider, were unanimously of opinion, that in this case the defendant ought to have costs. S. C. post. 181. And see Cockerel *v.* Knyaston, 4. Term Rep. 277. and Goldthwayte and his Wife *v.* Petrie, 5. Term Rep. 234.

*[95]

Case 131.

* The Queen *against* Watton.

The caption of AN INQUISITION of forcible entry upon the 8. *Hen.* 6. c. 9. stating it to be by "*jurors* "*sworn and* "*charged upon* "*their oath*, "*&c.*" is good, although the words "*to in-* "*quire for the* "*body of the* "*county*" be omitted.

S. C. Holt, 366. Cro. Jac. 633. Palm. 227. 1. Salk. 260. 353. 2. Salk. 450. 8. Mod. 65. Ld. Ray. 215. 548. 1710.

IN the caption of an inquisition of forcible entry, it was said, "JURATORES *jurat' et onerat' super sacramentum suum, &c.*"

BROTHERICK excepted, that it does not appear what the jury were sworn to do, whether they were an *inquest of inquiry*, or a *petit jury*; and though it might not be necessary to say, that it was "*ad inquirendum pro corpore comitatûs*," yet at least it ought to appear that they were *an inquest*.

THE COURT ordered precedents to be searched.

HARCOURT, at another day, informed the Court, that most of the inquisitions in the time of king *Charles the Second*, that wanted these words, "*ad inquirendum*," were quashed.

HOLT, *Chief Justice*, answered, that he had known inquisitions quashed for it; but since it was a particular offence, and at the suit of the party by the statute, by his consent, none should ever be quashed for it. In no indictment is it ever said what the jury is to enquire of, but only, *ad inquirendum pro dominâ reginâ pro corpore comitatûs*. As to the want of the words, *ad inquirendum*, in case of *petit* jury, you only say, *elect. triat' et jurat'*, without saying, *ad triandum exitum*: and here it is said, *jurat' et onerat' dicunt super sacramentum*, and it does appear that they were sworn to present, because there is no issue joined: and the reason why in *presentments* at the general quarter-sessions it is necessary to say, *ad inquirendum pro corpore comitatûs* is, because their commission is such, and the jury must enquire according to the commission; but here their commission is by a statute: and if it were an indictment for riot upon the statute of 13. *Hen.* 4. c. 7. it might perhaps be held well, without the word "*inquirendum*".

And the inquisition was confirmed PER CURIAM.

Parker

Parker *against* Sir William More. Case 132.

SIR WILLIAM MORE was taken up on *a Sunday*, upon a Judge's warrant, for escaping out of prison. A prisoner who has *escaped* may be re-taken on *a Sunday*, either by the officer on *fresh pursuit*, or by virtue of an *escape warrant*.

The question was, Whether this being on *a Sunday* were such a service of process as was against the statute of 29. *Car*. 2. c. 7.

And though the court of common pleas conceived it was, and had discharged some for that reason, yet now THE WHOLE COURT of king's bench held this taking to be in the nature of a *fresh pursuit*, that is, a further force and means added to a fresh pursuit by the statute. It is no *original process* (*a*); for a commitment upon it is but the old commitment continued down. The gaoler or party might have taken him upon a fresh pursuit upon *a Sunday* before this statute (*b*).

S C. 3. Salk. 148. S C 2. Ld. Ray. 1028 2 Salk 626. Ante, 21, 22. 63. Post. 96 154. 231 254. 5 Mod. 95. 450 8 Mod 21.

HOLT, *Chief Justice*, besides said, that if the Court relieve him, it must be by *audita querela*; for it being on *Sunday*, is a fact traversable.

But CÆTERI, If there were no more in it, we would do it upon motion, but would not relieve in this case.

12 Mod. 275. 348 606 Tidd's Pract. 53. Sellon's Pract. 15. 3 Com Dig "Escape" (E). "Temps" (B 3.) Stra 387. 1. Atk. 55 Sellon's Pract. 14. 1 Term Rep 265.

(*a*) But if *A* be arrested at the suit of *B* and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of *C* and be arrested on the *Sunday* following at the suit of *C* he shall be discharged by virtue of 29. *Car*. 2 c 7 for this is an *original taking*, and not a re-taking after an escape Atkinson *v* Jameson, 5 Term Rep 25

(*b*) Now by 5 *Ann* c 9 s 3. escape warrants may be executed on a *Sunday*

Anonymous. Case 133.

NOTE, On an escape out of either compter, the action must be against both the sheriffs of *London*. Action for an escape from THE COUNTER must be against *both* the sheriffs. Carth 145 1 Show 162 Co. Ent. 436 1 Roll Abr 99. Cro. Eliz. 625 3 Com Dig "Escape" (B 2)

*[96]

* Lidford *against* Thomas. Case 134.

EYRE moved to have the defendant discharged out of custody, for that he had been arrested on *a Sunday* by process out of this court; but in truth it appeared that he was taken without any warrant on *a Sunday*, and kept locked up until *Monday* morning, and then a writ was got (*b*).

If a bailiff arrest a person without warrant on a *Sunday*, and detain him by virtue of a warrant procured the next day, the Court will grant an *attachment* against the officer, but will not discharge the prisoner, for he may have an action for the *false imprisonment* 2 Keb 777 838. 1. Mod 56. 1 Salk. 8.

(*b*) If a person be arrested after the writ is returnable, the officer cannot legally detain him, though for the shortest time, until the writ be continued. Loveridge *v* Plaistow, 2 H Bl Rep 29. See also Planch *v*. Anderson, 5 Term Rep 37.

PER

LIDFORD against THOMAS

PER CURIAM. If you were imprisoned without a warrant, you have your remedy by *false imprisonment*, but then let them shew cause why *an attachment* should not go against them.

Ant 19. 5 Mod 95 1 Term Rep 617.

And it was said by GOULD, *Justice*, that attachments have gone frequently in such cases.

And so was the rule here.

Case 135. Anonymous.

A person arrested must be carried to the next gaol

Post 173 Ante, 10

HOLT, *Chief Justice*, said, that after arrest the bailiff ought to carry the party to the next gaol, if he do not desire to be carried to a place for to send for his friends (*a*).

(*a*) But see the statutes 2 *Geo* 2 c 24 the 21 *Geo* 2 c 33 and 32 *Geo*. 2. c 22 the 3 *Geo* 2 c 27 the 8 *Geo* 2 c 33.

Case 136. Anonymous.

Every publick officer is indictable for misbehaviour

1 Salk 75 380 5 Mod 96 1 Keb 933

PER CURIAM. If a man be made an officer by act of parliament, and misbehave himself in his office, he is indictable for it at common law, and any publick officer is indictable for misbehaviour in his office.

Case 137. The Queen *against* Dyer.

An indictment of forcible entry is good, although it omit the words *manu forti*

Cro Eliz 461 Latch, 224 2 Bulst 258. 2. Vent 265 1 Hawk P C ch 64 f 44 Ld Ray 610

AN EXCEPTION to an indictment for an entry into land was, that it was not said to have been *manu forti*, as the words of the statute 5. *Rich*. 2. c 7. are.

But PER CURIAM, At common law one was indictable for entering into land whereinto his entry was not lawful, though there was no force (*b*); but the statute forbids force in entering or detaining, even where the entry is lawful.

And here they would not quash the indictment.

(*b*) See Rex *v* John Stott, 3 Burr. Rex *v* Bake, 3 Burr. 1731 1698 Rex *v* Atkins, 3 Burr. 1706.

Case 138. Horner *against* Bonner.

Barren land, if it yield a profit, is tithable

S C ante, 86 2. Inst 655 Cro. Car 208. 2 Ld Ray 991.

SUIT was for tithes: A prohibition was moved for, suggesting the land to have been barren ground cultivated, and therefore ought to be exempted so long, &c.

CURIA.

CURIA: If land yield any profit before, as wood (a) &c. it is not within the statute 2. and 3. *Edw.* 6. c. 13. for it ought to be *suapte naturâ sterilis.*

[illegible] against [illegible].

(a) See the statute 45. *Edw.* 3. c. 3. 3. Com. Dig. "Dismes" (H. 3.).

*[97]

* The Queen *against* The Parish of Littleport.

Case 139.

TAWNEY some years before had been *overseer of the poor* of the parish of *Littleport*, and had disbursed several sums of his own money for the relief of the poor before any rate made: after, and before the end of his year, he was turned out by the justices of peace, whereby he lost the opportunity of reimbursing himself what he had advanced out of the poor's money.

And now *a mandamus* was directed to the churchwardens, overseers, &c. to make a rate for reimbursing him what he had been out of pocket on account of the poor. To which they returned, that the parish never agreed to his disbursements, and that his accounts were not allowed by the justices of peace.

EYRE, *for the parish.*

FIRST, This writ does not lie in this case; but it should be, first, to the justices of peace to settle his accounts.

SECONDLY, Though it be usual for overseers thus to advance money, yet the law gives them no remedy to come at it again; for the statute does not enable them to charge the parish with any debt, but he is first to raise the money, and then to employ it. A *constable* was bound to give money for the removal of vagrants, and so were *surveyors of highways* under a necessity of advancing money, yet they had no remedy for it till 14. *Car.* 1. c. . and *Will. and Mary*, c. . (a)

THIRDLY, If there had been any remedy, it should have been against the immediate successor; for you will not suffer an examination upon a forcible entry after three years time, as was adjudged in *Harris's Case.*

FOURTHLY, The writ ought to have fixed them to a sum certain, and not to have left it to the discretion of the overseers and *Tawney*. See the case of *The Queen v. Chafey* last Term.

WELLS, *contra.* When the overseers have advanced money for the relief of the poor, they become in the stead of the poor a

A *mandamus* does not lie to overseers to make a rate to reimburse their predecessors in monies expended for the relief of the poor; but if an overseer advance his own money to the use of the poor of the parish, he may, during his continuance in office, get a rate for the relief of the poor, and reimburse himself the monies he had advanced, and a *mandamus* will lie to compel the justices to sign and allow such a rate: but if he omit to do this he has no remedy.

S. C. Foley, 8.
S. C. 2. Salk. 531.
S. C. 3. Salk. 232.
S. C. 2. Ld. Ray. 1009.
S. C. 10. Mod. 104.
S. C. Holt, 579.

Ante, 97. Carth. 118 393. 450. 160. 362. 2. Salk. 529. Stra. 42. 93. 211. 512. 1004. 1071. 1123. 1261. Ld. Ray. 798. 8. Mod. 338. 10. Mod. 104. 11. Mod. 222. 12. Mod. 251. 327. 559. 1. Peer. Wms. 670.

(a) By 17. *Geo.* 2. c. 38. the poor of every parish are to be registered; and by the 9. *Geo.* 1. c. 7. s. 2. no officer of any parish shall bring to the account of the parish any monies that he shall give to any poor person who is not registered. And by 18. *Geo.* 3. c. 19. a mode is prescribed of reimbursing constables such monies as they shall pay on account of the parish. See also Rex *v.* Barlow, 2. Salk. 609. and 1. Bott's P. L. 375.

charge

THE QUEEN *against* THE PARISH OF LITTLEPORT.

charge for so much to the parish; and in case of a bastard child, they shall be allowed what they have laid out to the midwife, or maintenance of the child, before any order made. And the cases objected, where a law was fain to have been made on purpose for reimbursement, they are nothing like this; for here the parish is by the law chargeable to the relief of the poor, but there it was not chargeable by any means.

HOLT, *Chief Justice*. The question is, how the law stands. The statute appoints a method for the relief of the poor, *viz.* that the churchwardens and overseers, and such inhabitants as they shall call to them, shall make a rate: but here the officer begins the wrong way, that is, advances money without any rate made; and this is the way to oppress the parish with too great a charge: and if any sudden charge come after a rate made, there ought to be a new rate made for that, though I do not say but that a rate may be made after the poor are relieved; but then the order ought to be for levying the money for *the poor*, and not for *the overseer*, though it is reasonable the overseer should thereout satisfy himself for what he before laid out; but still the overseers must account with the justices for what they have received, and what laid out: and this is not like the case of a bastard child, for there is no method of raising or of laying the money out in that case as there is here.

2. Salk. 525. 531. 533.

POWELL, *Justice*, *accord*. I would help you if I could. It is true, there may be such an exigency as would not admit of the delay of a rate; and there the overseer may advance, and ought to have a rate in convenient time, and have it approved as it ought by the justices; and if they refuse to approve, there a *mandamus* had been proper; but still that rate ought to be a poor's rate, and not to reimburse himself, but that is his own business, when he gets the money: but the overseer is not obliged to advance any money until rates be made and the money raised; and by the statute a rate ought to be made once a-month.

Now this Term it was urged, that by the statute of 43. *Eliz.* c. 2. by which overseers of the poor are appointed, he is to be chosen yearly at *Easter*; and immediately before any rate can be made, here will be a necessity for money; for justices of peace make orders upon overseers to relieve such a person without taking notice whether there be money or not, and indictments have been frequent for disobeying such orders: and *Dalton's Justice of Peace* was quoted, where it is said, that an order of sessions for refunding an overseer had been allowed of: and as to the objection, that it is not to levy any sum certain, it could not be otherwise, for if *a mandamus* were to levy thirty pounds, and but twenty pounds due, it would be a good return to say, that there were not thirty pounds due.

Quod HOLT *negavit (a).*

(a) See the case of Rex v. Grey, ante, 89.

HOLT, *Chief Justice*. An overseer need not advance a farthing of his own money, for the churchwardens and overseers of the poor may make a rate whether the parish will or not, so it be confirmed by justices of the peace; and if any refuse to pay such rate, it may be levied by distress: and there ought to be a *monthly rate*, because possessors are to pay, and possessions frequently change.

THE QUEEN *against* THE PARISH OF LITTLEPORT.

Carth. 160. 362.

* And PER TOTAM CURIAM. the writ of *mandamus* was quashed (*a*).

(*a*) See Rex *v*. Ware, 1 Bott's P. L. 272. Rex *v*. Limehouse, Foley, 22. Rex *v*. Overseers of Chichester, 1. Bott's P. L. 276. Rex *v*. Welch and Others, 1. Bott's P. L. 277. Rex *v*. Macclesfield, 1. Bott's P. L. 78. 239. 269.

The Queen *against* Daniell

Case 140.

DANIELL was indicted, for that he one *Charles Scott*, servant and apprentice of one *Joseph Bishop* of *London*, *à shopâ et domo, et à servitio præd.* JOSEPH *discedere; et seipsum absentare procuravit, allexit, persuasit, et causavit.*

An indictment will not lie against a man for inticing an apprentice to leave his master's service; for it is of a private nature, and to the prejudice of a single person only; the remedy is by *action on the case*; but to persuade a servant or apprentice to embezzle his master's goods is an indictable offence.

BROTHERICK excepted, that there was no averment, that the servant had left the service; and though in some cases, if one advise or persuade another to an ill thing, if the thing be done in pursuance of such advice, the advisor shall share in the offence; yet in no case is the bare giving advice, or endeavouring to persuade one to do an ill thing without more, punishable: but he agreed, that if several conspire and confederate together to do an ill thing, though nothing more be done, it will be indictable, because the meeting together in order to such confederacy is unlawful (*a*). All that is charged here might be for prevailing with this servant to go with him to the next door to drink a pot of ale. If a freeman of a corporation or borough endeavour, intend, or conspire with others, to do an act that tends to the prejudice of the corporation, yet if there be no act done, it is no good cause of disfranchisement, nor of indictment (*b*); *à fortiori*, it will not be a good cause here, where the endeavour is only to the prejudice of a single person in one particular instance: and the rule is, "*Non officit conatus nisi sequatur effectus.*" Even in a conspiracy there must be something done in pursuance of it. The strongest case of this kind was the case of *The King v. Starling* (*c*); it was an indictment for meeting and conspiring together how to impoverish the farmers of the excise; and the reason why that was held indictable was, because such a thing would affect the publick revenue; but if the conspiracy were, that none should buy coffee from *B*. and no more done, it would not bear an

S. C. post. 182. 289.
S. C. 1. Salk. 380.
S. C. 3. Salk. 91.
S. C. Holt, 346.
S. C. 2 Ld. Ray. 1116.
2 Roll. Abr. 75.
Noy, 105.
Poph 132.
4. Com. Dig. "Indictment" (I.)
Cowp. 54.

(*a*) Vaughan's Case, Poph. 134. 2. Roll Abr. 75.
(*b*) Baggs' Case, 11. Co 98. 1. Roll. 650 675 682.
Rep. 226.
(*c*) 1 Sid 174. 1. Lev. 125. 1. Keb.

The Queen *against* Daniell.

indictment: so if a confederacy be to way-lay a man, and kill him, or rob him.

But Holt, *Chief Justice*, denied the two last instances.

The second exception was, that it was not said how long he has withdrawn, in case any absenting or withdrawing be understood, which ought not to be; for whatever is essentially necessary to maintain an indictment, must be directly and clearly charged, and not by inference only.

King, *contra*. The words "causing, procuring, &c." are very strong, and necessarily import a withdrawing; and he quoted a precedent of this kind out of *Rastal (a)*. Surely this is a matter indictable, for it breaks that trust which is between master and apprentice, with very ill example and publick influence to all the apprentices in *England*.

* [100] * Holt, *Chief Justice*, doubted whether it were an offence indictable, because it was only a private wrong to the master; and that inticing, &c. a man to do a thing, necessarily imported that the thing was done. The *Case of Starling* was directly of a publick nature, and levelled at the Government; and the *gist* of the offence was its influence on the publick, and not the conspiracy, for that must be put in execution before it is a conspiracy: if two or three confederate and agree to indict a man of a crime of which he is not guilty, the very meeting and agreement is an ill and unlawful act, but not indictable perhaps; but if a meeting be to rob or kill, it may be indictable; but even there advising one to rob or kill, without something be done thereupon, is not indictable; and if a man commit any offence under treason or felony, and another desire him to withdraw from justice, or do receive or harbour him in his house, &c. it is no offence punishable, no more than it is to protect a man in his house from arrests in a civil action. And since you do not say for how long time the absence was, if there were no more in it, how can the Court apportion the punishment to the offence? And he agreed, that a conspiracy to charge one with a bastard-child is indictable (*b*); but if one should advise another to do it without more, it would not.

Ante, 48. 55. 1 Vent. 206. 2. Vent. 25.

Powell, *Justice*, thought this matter indictable, because there are many acts of parliament concerning the regulation of apprentices and servants, and that to run counter against any of those acts, is matter indictable; for it becomes a publick concern, that they should be kept in good order: if one prevail with a wife to leave her husband, he is indictable for it, though it be of no more publick nature than this, because it is a breach of the common society of mankind; and this tends to destroy the publick trust and confidence that ought to be between master and servant;

(*a*) Rastal "Indictment". 137. 185. See also Ld. Ray. 81. 377.
(*b*) Hob. 219. Reg. v. Best, post. 1169.

and in respect whereof the law makes it a greater crime in a servant to kill his master than in another, for it is *petit treason* in him, and only *murder* in another: and he quoted *the Poulterers' Case (a)*, where bare conspiracy without more was held indictable. Then let us see the manner of laying it, and I think it is well enough, for the case will lie for procuring a *false return*, with alledging, that a false return was made; and though there be no certain time of absence laid, it is *discedere à servitio*, and that shall be a final and total withdrawing.

THE QUEEN against DANIELL.

1. Sid. 68. 1. Lev. 62. Mo. 813. Cro. Car. 15. 2. Bulst. 271. 1. Jo. 93. Lat. 79. Hard. 196.

GOULD, *Justice*, accorded with POWELL *in omnibus*.

BROTHERICK. Every violation of the law, every common trespass, is *in malum exemplum*, but not indictable (*b*); and as to the continuance of absence, if a man lay a common trespass done at such a day, it shall not be intended to continue farther without a *continuando:* sure then it will be hard to intend an offence laid in an indictment to be committed at a certain day, to continue longer than is expresly laid: and he said, that if, at common law, one had bound himself for a year, and another had prevailed with him to absent * himself from that service, an indictment would not lie for it: indeed, if this were the case of an apprentice compellable to serve by act of parliament, it would be the stronger against me; but for a bare apprentice, that is only under an obligation of his own making, it is very hard to maintain it.

* [101]

HOLT, *Chief Justice*. If a servant for a year, or at will, kill his master, it will be *petit treason*; and yet to intice such a servant to leave his master, would not be indictable; so that reason fails; for the reason why it is *petit treason*, is because of the breach of duty, and not of the continual obligation of service.

The case was moved again this Term, and THE WHOLE COURT unanimously resolved, that the indictment was ill as to the manner, for want of an express allegation that the servant did absent; for though a cause cannot be without an effect, and it is said that the defendant *caused* him to leave his service, yet in indictments it ought to be expresly said, that *the effect* did follow; and so it was in the case of *The Queen v. Tracy* (*c*) before. *Fitzherbert* (*d*) was quoted, that *trespass* might lie for seducing a servant (*e*), and THE COURT said, there might be a difference between *a servant* and *an apprentice*. And they would not resolve whether the matter of this indictment were sufficient or not.

1. Salk. 380. Ante, 30. Post. 114. 171 289.

The judgment was arrested *nisi* before the end of the Term.

And the last day of Term, HOLT, *Chief Justice*, said, he was not satisfied, that to seduce one's servant away was indictable,

(*a*) 9. Co 55.
(*b*) See 3. Burr. 1698. 1706. 1731.
(*c*) Ante, page 30.
(*d*) Fitz. N. B.
(*e*) See Hart *v.* Aldridge, Cowp. 54. that a master may bring trespass for seducing his servant, although he is only employed as a *journeyman*, to work by the piece.

but

THE QUEEN *against* DANIELL.

but to persuade him to embezzle his master's goods was: but then, whether it were necessary to alledge that he had embezzled them, for he said the indictment might perhaps be for the evil act of persuading (*a*).

An indictment for embezzling a master's goods must state

BUT NOTE, here it was said, that the servant did embezzle; but no *venue* was laid.

SO THE JUDGMENT was arrested.

(*a*) This case was moved again, and THE WHOLE COURT were of opinion, that the *enticing* of an apprentice or a servant to depart from his master is not an offence of a *publick nature*, but that the remedy is by action on the case. Post. 182. But *enticing* an apprentice or servant to steal his master's goods is an indictable offence. Rex *v.* Collingwood, post. 289.

Case 141.

Ireland's Case.

In debt on bond the defendant, on bringing *principal interest* and *costs* into court, shall be relieved against the penalty.

RAYMOND moved to bring principal, interest, and costs, into court, and to be relieved against the penalty.

MONTAGUE urged, that in this case they would not relieve in chancery, unless the party obligor would pay a debt barrable by the *statute of Limitations*; and insisted on the like benefit here, this being an equitable motion.

Ante, 11. 25. Post. 153.

But THE COURT would not hear of it, but made the common rule.

Salk. 597. 2. Stra. 900. B. R. H. 116. 5. Com. Dig. "Pleader" (C. 10.).

NOTE, The whole penalty must be brought into court, because interest and full costs are to be taxed; and one may have the remnant out immediately (*b*).

Vide ante, 11. 25. 60. Post. 153. 2. Salk. 583. 596, 597.

(*b*) By 4. and 5. *Ann.* c. 16. "In an "action on a bond with a penalty, if the "defendant bring into the court where "the action is depending, all the prin- "cipal and interest due, and all costs "expended in any suit in law or equity, "upon such bond, the money brought "in shall be taken in full satisfaction of "such bond, and the Court may give "judgment to discharge the defendant "of and from the same." See 1. Wils. 157. 1. Term Rep. 629. 711. Stra. 1271. 4. Term Rep. 10. 3. Term Rep. 657. But in debt on bond with condition to account for money to be received, the Court will not stay proceedings or payment of the penalty into court; for in such case damages may be recovered for more than the penalty. Lord Lonsdale *v.* Church, 2. Term Rep. 388.

* [102]

Case 142.

* Crosse *against* Bilson

Replevin for taking a mare in the highway. Salk. 3. Pract. Reg. 157.

NORTHAMPTON, *to wit.* } JOHN BILSON was summoned to answer to *Samuel Crosse* in a plea why he took a mare of him the said *Samuel*, and unjustly detained it, against surety and pledges, &c. And whereon the same *Samuel*, by *W. L.* his attorney, complains, that the said *John*, on the first day of *October*, in the twelfth year of the reign of our lord *William the Third*, late *King of England*, &c. at *Hardingston*, in the county aforesaid, in a certain place there called the *King's Highway*, a

mare of him the said *Samuel* took, and unjustly detained it, against surety and pledges, until, &c. whereby the same *Samuel* says, that he is prejudiced, and hath damage to the value of 10l. And therefore he produces the suit, &c. [illegible] against Bilson.

And the said *John Bilson*, by *J. B.* his attorney, comes and defends the force and injury when, &c. and as bailiff of the most noble *William Lord Leimpster* well acknowledges the taking of the mare aforesaid the said time when, &c. in a certain place called the *Queen's Highway*, and justly, &c. because he says, that the said place contains, and the said time when, &c. did contain, within itself, half a rod of land, with the appurtenances, in *Hardingston* aforesaid; which said half rod of land long before, and the said time when, &c. was parcel of a certain ancient messuage in *Hardingston* aforesaid; which said messuage long before, and the said time when, &c. was the soil and freehold of the said *Lord Leimpster*; and because the mare aforesaid the said time when, &c. was in the said half rod of land in which, &c. doing damage there, the said *John*, as bailiff of the said *William Lord Leimpster*, well acknowledges the taking of the mare aforesaid in the place in which, &c. and justly, &c. doing damage there, &c. without that, that the said *John* took the mare aforesaid in a certain place called the *King's Highway*, as the said *Samuel* against him hath declared: and this he is ready to verify: wherefore he prays judgment, and a return of the mare aforesaid, to be adjudged to him, &c. Cognizance for *damage feasant.*

And the said *Samuel* says, that the said *John Bilson*, as bailiff of the most noble *William Lord Leimpster*, the taking of the mare aforesaid ought not to acknowledge just, because he says, that he the said *John Bilson*, the said time when, &c. took the mare aforesaid in the said place then called the *King's Highway*, in manner and form as the said *Samuel* above by declaring hath alledged; and this he prays may be enquired of by the country. Plea in maintenance of the declaration.

And the said *John* says, that he to the plea of the said *Samuel* above in replying pleaded hath no necessity, nor is by the law of the land obliged in any manner to answer, because he says, that the same plea is not sufficient in law to maintain his declaration aforesaid: and this he is ready to verify: wherefore for want of a sufficient replication in this behalf the same *John* as before prays judgment, and that the declaration aforesaid may be quashed. Demurrer.

And the said *Samuel*, for that he hath above alledged sufficient matter in law for him the said *Samuel* to maintain his action and declaration aforesaid, which he is ready to verify, which said matter the said *John* doth not deny, nor to the same in anywise answer, but that averment hath altogether refused to admit, prays judgment, and his damages by reason of the taking and unjust detention of the mare aforesaid, to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premises before they Joinder. 1. Sid. 18[illegible], 1[illegible] 1. Ven. [illegible]35, 1[illegible] Cro. Eliz. 20[illegible]

CROSSE against BILSON.

they give judgment thereon, day is given to the parties aforesaid here until from the day of *St Michael* in three weeks to hear their judgment thereon, because the same justices here thereof not yet, &c. On which day here comes as well the said *Samuel* as the said *John* by their attornies aforesaid; and hereupon the premises being seen, and by the justices here more fully understood, it seems to the same justices here, that the plea of the said *Samuel* above in replying pleaded is sufficient in law to maintain his declaration aforesaid, as the said *Samuel* hath above alledged; wherefore the said *Samuel* ought to recover his damages by reason of the premises against the said *John*: but because it is unknown what damages the said *Samuel* hath sustained by reason of the premises, the sheriff is commanded, that by the oath of twelve good and lawful men of the county aforesaid he diligently enquire what damages the said *Samuel* hath sustained, as well by reason of the premises as for his costs and charges by him about his suit in this behalf expended; and the inquisition which he shall thereof make certify here on the octave of *St. Hilary*, under the seal, &c. and the seals, &c. On which day here comes the said *Samuel* by his attorney aforesaid, and the sheriff, to wit, *Caesar Child*, *Bart.* hath now returned here a certain inquisition taken before him at the town of *Northampton*, in the county aforesaid, on the nineteenth day of *January* last past, by the oath of twelve, &c. whereby it is found, that the said *Samuel* hath sustained damages by reason of the premises, besides his costs and charges by him about his suit in this behalf expended, to eighty shillings, and for those costs and charges to two-pence. Therefore it is considered, that the said *Samuel* do recover against the said *John* his damages aforesaid to eighty shillings and two-pence by the inquisition aforesaid in form aforesaid found, and also twelve pounds seventeen shillings and fourpence to the said *Samuel* at his request for his costs and charges aforesaid, by the court here of increase adjudged; which said damages in the whole amount to sixteen pounds seventeen shillings and sixpence. And the said *John* in mercy, &c.

Judgment for the plaintiff.

Inquiry awarded.

Final judgment.

Afterwards, to wit, on day next after in this same Term, before the lady the queen at *Westminster*, comes the said *John*, by *A. M.* his attorney, and says, that in the record and proceedings aforesaid, and likewise in the rendition of the judgment aforesaid, there is manifest error, in this, to wit, that by the record aforesaid it appears, that the judgment aforesaid in form aforesaid given, was given for the said *Samuel Crosse* against him the said *John Bilson*, when by the law of the land of this kingdom of *England* judgment in the plea aforesaid ought to have been given for the said *John* against the said *Samuel*: There is error also in this, to wit, that by the record aforesaid it appears, that the said *John* was summoned to answer to the said *Samuel* in the plea aforesaid, yet no original writ between the parties aforesaid in the plea aforesaid is filed of record, nor remains of record in the said court of the lady the queen of the bench; therefore in that there is manifest error: There is error also in this, to wit, that by the record aforesaid it appears, that the said *Samuel* in the said court of the

General errors assigned.

No original.

No warrant of attorney.

the

the lady the said queen of the bench came and appeared by *W. L.* his attorney, yet the said *W. L.* had no warrant of attorney of record by writ of the now lady the queen, nor without writ, to warrant his appearance for the same *Samuel* in the plea aforesaid: There is error also in this, to wit, that by the record aforesaid it appears, that the said *John* in the said court of the said lady the now queen of the bench appeared by *William Marriot* his attorney, nevertheless *William Marriot* had no warrant of attorney of record by writ of the lady the queen, nor without writ, to warrant his appearance for the said *John* in the plea aforesaid: And the same *John* prays several writs of the lady the queen, to wit, one to the Chief Justice of the said lady the queen of the bench, and another writ to the *custos brevium* of the said lady the queen of the bench aforesaid to be directed, to certify the said lady the now queen more fully the truth thereof: And to him they are granted, &c. Whereupon *Tuesday* next after fifteen days of the *Holy Trinity* is given by the court of the said lady the queen now here to return to the court of the said lady the queen, before the queen herself at *Westminster*, the said several writs of *certiorari* above prayed: The same day is given to the said *Samuel* there, &c. And the said Chief Justice of the bench aforesaid, and the said *custos brevium* of the said lady the now queen, on that day have not, nor hath either of them, returned the several writs aforesaid, neither have they, or either of them, done any thing therein: And hereupon the said *Samuel* freely here into court comes and says, that there is no error either in the record and proceedings aforesaid, or in the rendition of the judgment aforesaid; and prays that the court of the said lady the queen now here may proceed to the examination as well of the record and proceedings aforesaid as of the matters aforesaid above for error assigned, and that the judgment aforesaid may be in all things affirmed: but because the court of the said lady the queen now here are not yet advised to give their judgment of and upon the premises, day therefore is given to the parties aforesaid before the lady the queen until in a month of *St. Michael* wheresoever, &c. to hear their judgment thereon, because the court of the said lady the queen now here thereof not yet, &c. On which day before the lady the queen at *Westminster* come the parties aforesaid, by their attornies aforesaid; whereupon as well the record and proceedings aforesaid, and the judgment on the same given, as the said causes and matters above for error assigned and alledged, being seen, and by the court of the said lady the queen now here more fully understood and diligently examined, because it seems to the court of the said lady the queen here, that the judgment aforesaid is in nothing vicious or defective, and that there is no error in that record; it is considered, that the judgment aforesaid be in all things affirmed, and remain in its full force and effect, the said causes above for error assigned in anywise notwithstanding, &c. And it is farther considered by the same court, that the said *Samuel* do recover against the said *John* twelve pounds to the same *Samuel* by the court of the said lady the queen now here by his assent adjudged, according to the form of the statute thereof lately made

Crosier against Wilson.

Several certiorari's prayed.

Rule to return them.

No error.

Judgment affirmed.

3. H. 7. c. 10.

CROSSE *against* BILSON.

and provided, for his costs, charges, and damages, which he hath sustained by reason of the delay of execution of the judgment aforesaid, on pretence of prosecuting the said writ of the lady the queen to correct error of and upon the premises; and that the same *Samuel* may have thereof his execution, &c.

* [102]
Case 143.

* Crosse *against* Bilson.

Trinity Term, 2. Anne, Roll 146.

In replevin, if the defendant plead *in bar*, and demur to the replication *in abatement*, the plaintiff, after joinder in demurrer, shall have *final judgment* on the demurrer being over-ruled.

S. C. 1. Salk. 3. S. C. Lilly, 351. S. C. Holt, 627. S.C. 2. Ld. Ray. 1016. S. C. Gilb. Distresses, 16. Barnes, 353. 5. Com. Dig. "Pleader" (3. K. 11.). (3. K. 13.).

REPLEVIN for taking his mare in a certain place called "*The King's Highway.*"

The defendant acknowledged the taking *damage feasant* in a certain place called "*The Queen's Highway*," as bailiff to the *Lord Lempster*, whose freehold the place WHERE is, ABSQUE HOC that he took the said mare in the place aforesaid called "*The King's Highway*," as the plaintiff against him has declared; *et hoc paratus est verificare*; *unde petit judicium*; *et return. &c.*

The plaintiff comes and says, "*quod cognoscere non debet, quia dicit quod dicto tempore quod, &c.*" he took the said mare in the place aforesaid then called "The King's Highway," *modo et formâ* as the said plaintiff alledged; *et hoc petit quod inquiratur per patriam.*

The defendant demurs, and concludes, "*unde (ut prius) petit judicium, et quod narratio præd. cassetur.*"

Judgment final was given in the common pleas for the plaintiff, and affirmed upon a writ of error.

HOLT, *Chief Justice.* The whole point of the case, take it the strongest that can be, is thus: After a plea *in bar* and a replication the defendant demurs to the replication, and concludes *in abatement*, and sure there *judgment final* ought to be given.

In replevin, if the taking is avowed in another place the freehold of the defendant as *damage feasant*, and the plea TRAVERSE the place in the declaration, and conclude with praying judgment and a return, this is a plea *in bar*.— Show. 169. 1. Salk. 3. 5. 93, 94.

AND THEY ALL AGREED, that all the matter of conusance in the plea was waived by the ABSQUE HOC, and the conusance being in a different place from where the declaration lays the taking, is, in truth, matter only proper *in abatement*; but the conclusion turning it into an avowry makes it a plea *in bar*, as all *avowries* are, and *final judgment* is always given upon them, if they go for the avowant.

Where matter of *abatement* is pleaded *in bar*, &c. judgment final ought to be given. Cro. Jac. 202. 253. 2. Show. 4. 155. Lut. 42. 1. Mod. 239. 1. Sid. 189.

THEY ALSO AGREED, that where matter *in abatement* is pleaded *in bar*, and concluded *in bar*, *judgment final* ought to be given. So where the commencement of a demurrer is *in bar*, though the conclusion be *in abatement.* 1. Lev. 312.

But

But it was objected, that the demurrer being ill concluded, *viz. in abatement*, and contrary to *the bar*, it was to be looked upon as if there were no conclusion at all, and it would be *a discontinuance*, and judgment ought to be by *nil dicit*.

In replevin, if a demurrer to a repleader ob. a plea *in bar* conclude, "where-"fore, as be-"fore, he prays "judgment, and "that the declaration may be "quashed," the last words are surplusage.

To which THE COURT answered, that the conclusion to the demurrer was, "*unde petit judicium (ut prius)*," and that is well enough, and according to the conclusion of the plea *in bar*; and the subsequent words *et quod narr. cassetur*, being inconsistent, shall be rejected.

So PER TOTAM CURIAM the judgment was affirmed (*a*).

POWELL, *Justice*, here positively said, that *a repleader* could never be upon *demurrer*, but is always after *issue*: though the old Books seemed to make a question of it, yet there were twenty authorities in the new Books of it (*b*).

A repleader cannot be upon a demurrer. Ante, 2.

3 Lev. 20 440.

And yet BROTHERICK seemed as earnest of a contrary opinion at the bar,

Tacente HOLT, *Chief Justice*, *et Cur. reliquâ.*

Also, no *repleader* can be upon a writ of error. *Vide* 2. *Keb.* 769. 789. 825.

*[103]

* NOTE, In the debate of this case at THE BAR it was agreed,

In replevin, the plea of *propd in autre lieu* is matter of *abatement*.

FIRST, That the matter of this plea was matter in abatement, *viz.* a variance in the places.

1 Roll Abr 781 3 Mod 248. Barnes, 351.

SECONDLY, That in *replevin* the defendant is both actor and defendant. As defendant, he may abate the plaintiff's writ, and that were vain for him to do if he could not have a return, and therefore he must proceed from his plea *in abatement* to make *conusance*, for his action being a claim of right to distrain, he ought to make title to it against the plaintiff in the *replevin* who claims property in the distress. Yet this rule would be explained, *viz.* if the defendant in *replevin* claim property in himself, he shall have return without conusance, because his plea destroys the plaintiff's title. So if he lay property in a stranger, and make no conusance, if that matter be admitted by the plaintiff, there shall be a return without conusance; for in that case, by the admittance the plaintiff's property is destroyed (*c*).

In replevin, if the defendant plead *property in himself*, he shall have a return without cognizance; but if he plead *property in a stranger*, he must make cognizance

Ante, 69 81. 1 Salk 94. 2 Lev 92 1 Vent 127 Cro Eliz 86. Cro Jac 59. 3 Com Dig. "Pleader" (3 K 13). Str 1 507 Lilly 351.

But in all pleas that do not shew the property out of the plaintiff there must be a conusance made, and *the plea* is what only is answerable, and not *the conusance*; for to traverse that would be a *discontinuance* (*d*).

(*a*) See the case of Robinson *v.* Raby, 1 Burr. 317.

(*b*) Ante, 2 Carth. 193. AND NOTE, the Year Book 9 *Hen.* 6 pl 25. is contrary to the record

(*c*) Ante, 81. 2 Lev. 92. 1. Bac. Abr. 14, 15.

(*d*) Year Book 8 E [illegible] 4 pl [illegible] Watts *v.* Haw[illegible], [illegible] and Hall *v.* Foot, Mich [illegible], *W. & Mary*, in King's Bench, 1 Salk 93.— See also 1 Salk. 94.

If

Matter *in bar* concluding *in abatement* shall be taken *in bar*.

1. Cro. 202.
5. Mod. 130.
3. Keb. 181.
Vide 1. Vent. 136.

If a man plead matter *in bar*, and conclude *in abatement*, it shall be taken for a plea *in bar* from the nature and reason of the thing (*a*); for the plaintiff can have no writ if he has not a cause of action; and therefore the Court will take the plea to be *in bar* (*b*). If one plead matter of *abatement*, and conclude *in bar*, "*et petit judicium* whether the plaintiff *actionem habere debet*." though he begin *in abatement*, and the matter be also in abatement, yet the conclusion being *in bar* makes it a bar (*c*); and the reason is, because you admit the writ by concluding specially against the action (*d*).

In replevin, if a defendant avow at a *different place* to have return, he may plead in abatement, and *traverse* the place laid in the declaration.
Post. 157.
1. Salk. 93.
Stra. 507.
5 Com. Dig. "Pleader" (3. K. 13.).

And here HOLT, *Chief Justice*, said, that in *replevin* if the defendant will take advantage of *a variance* in the place where the taking is laid from that in which really it was, he must plead it *in abatement*, and begin either *petit judicium de breve, et de narrat. quia dicit* the cattle were taken in such a place, ABSQUE HOC that they were taken in the place in the declaration. Then indeed he comes, *et pro retorn. habendo* distinctly, he says, he avows the taking in the place mentioned in the inducement of his traverse, *damage feasant*, or for rent, &c. To which no answer is to be given, but all is to depend on the plea *in abatement*.

Defendant in replevin need not pray *damages* either upon an *avowry* or a *plea*.

And it is a proper conclusion in *replevin* to say, "*unde petit* "*judicium et return. averior*, without saying any thing of damages, for they are given by the statute (*e*).

(*a*) Cornish *v.* Prior, 1. Show. 4.; Bosse *v.* Harcourt, 1. Show. 155.—See also 1. Bac. Abr. 15. 4. Bac. Abr. 50.

(*b*) Year Books 37. *Hen.* 6. pl. 24.; 36. *Hen.* 6. pl. 24.—See also 10. Mod. 112. 192. 210. Gilb. Eq. Rep. 251. Ld. Ray. 101. 337. 593. 1018. Stra. 532. 1161.

(*c*) 1. Lutw. 34.

(*d*) Year Books 18. *Hen.* 6. pl. 27.; 32. *Hen.* 6. pl 17. 36. *Hen.* 6. pl. 18. 22. *Hen.* 6. pl. 53.

(*e*) See the statute 17. Car. 2. c. 7. and 1. Salk. 205. 1. Sid. 380. 1. Lev. 255. 1. Vent. 40. Ray. 170.

*[104]

Case 144.

* Ogden *against* Turner.

A declaration in slander for saying, "There "goes *A.* who "is one of those "that stole *B.*'s "deer," must aver, that a deer was stolen from *B.* and that it was tame.

ACTION ON THE CASE for these words: "There goes *Ogden*, "who is one of those that stole my *Lord S.*'s deer."

Against the action it was offered, that words spoken are not like words in deeds, for that words are to be taken *fortius versus proferentem* in deeds, &c. but otherwise in the case of an action for speaking them (*a*). It is not actionable to say that "*he stole* "*a deer*," without averring it to be a tame one (*b*); or, if that be averred, without alledging that he knew it to be a tame one (*c*). And here it is not averred that *a deer* was stolen from *my lord*, as it ought to be; as if it be said, "*A.* poisoned *B.*" without averring him to be dead, the words are not actionable.

S.C. 2. Salk. 696.
S. C. Holt, 40.
Ante, 23. 1. Jones, 196. Cro. Car. 140. Yelv. 9. 64. Cro. Jac. 58. 1. Roll. Abr 60.

(*a*) *Dictum per* HOBART, in the case of Coote *v.* Gilbert, Hob. 77.

(*b*) 1. Roll. Abr. 70. pl. 50. 54.

(*c*)

Ogden against Turner.

It was urged *contra*, That this must be understood to be a tame deer, of which felony may be committed, and then without question it will bear an action; or it will be understood of a deer in a park or place where deer are kept, and then it comes within the punishment of the statute of 3. & 4. *Will. & Mary*, c. 10. against Deer-Stealers, whereby they are to pay thirty pounds and imprisonment, or pillory and imprisonment (*a*); therefore *quâcunque viâ datâ*, the action will lie. And the case of *Davis v. Garden* (*b*) was insisted on, that to say of a woman that "*she has* "*a bastard*," is actionable, because it brings her within the danger of the statute of 18. *Eliz.* c. 3. (*c*). And if the defendant had indicted the plaintiff here, after acquittal he might have maintained an action for it.

Curia. Words which of themselves are actionable, without regard to the person or foreign help, must either endanger the party's life, or subject him to infamous punishment; and it is not enough that the party may be fined and imprisoned, for if one be found guilty of any common trespass he shall be fined and imprisoned, yet none will say, that to say one has committed a trespass will bear an action; or, at least, the thing charged upon him must in itself be scandalous. And this here is, that "*he stole a deer*," which is *feræ naturæ*, and therefore not scandalous. To say such a one *burnt a barn*, without saying that it was part of a mansion-house, or had corn in it, is not actionable (*d*); and the case of *Sir Lionel Walden* (*e*) was carried too far, and happened in a dangerous time, when the kingdom in general was most furiously enraged against popery: the words were, "*Lionel Walden* is a "papist, and goes to mass." And the penalty by the statute is a pecuniary one, and the pillory is only for want of money, so is not the direct penalty given by the statute.

And besides, Holt, *Chief Justice*, said, that the *pillory* upon this account did not make the person infamous, but he would remain a good witness nevertheless (*f*). And to say, that one has hunted in a park without leave of the owner, and killed a deer there, which subjects him to the penalty of the statute *de Malefactoribus in Parcis* (*g*), or to call a man *a papist* simply (*h*), will not bear an action. And he said, that to say of a * young woman that "*she* "*had a bastard*" is a very great scandal, and for which, if he could, he would encourage an action; but it is not actionable, because it is a spiritual defamation, punishable in the spiritual court (*i*). So it is to call a man "*a heretick* (*k*). And he denied the first reason given in *Anne Davis's Case* (*l*).

* [105]

2. Salk 696.

And by the whole Court, *Querens nil capiat per billam.*

(*a*) Repealed by 16 *Geo.* 3. c. 30

(*b*) 4. Co. 16. b.

(*c*) See 1. Vent. 4. 1. Sid. 396. 2. Sid. 7. 21. Palm. 298. 1. Roll. Abr. 34. 37, 38. 1. Cro. 436.

(*d*) See Barham's Case, 4. Co. 20.

(*e*) 2. Vent. 265. 3. Lev. 30. 1. Leon. 336. 3. Mod. 26.

(*f*) See 5. Mod. 15. 76. and the case of Pendock v. Mackender, 2. Wils. 18.

(*g*) 3 *Edw.* 1. c. 20.

(*h*) 3. Mod. 26 2. Show. 250. 2. Ld Ray 812 1 Viner's Abr. 442. 499. 1. Brown's Parl Cases, 97.

(*i*) 1. Roll. Abr. 37. Cro Jac. 473. Poph. 140.

(*k*) Year Book 27. *Hen.* 8. pl. 14.

(*l*) 4. Co. 17.

Anonymous.

Case 145. Anonymous.

If feme covert be arrested, common bail may be filed.

PER CURIAM. If *feme covert* be arrested, and it be clear and notorious that she is *covert*, common bail ought to be received; but if it be doubted, she ought to find special bail (*a*).

Ante, 17. 86. S. C. 1. Salk. 379. Post. 310. 12. Mod. 444. 1. Barnes, 59. Stra 1167. 1237. 1272. 7. Mod. 10. Tidd's Pract. 49. 1. Bac. Abr. 210, 211.

(*a*) See the case of Edwards *v.* Rourke and his Wife, 1. Term Rep. 486. in point. But if the coverture be not clearly made out, the Court will not discharge her on *motion*, Pearson *v.* Meadow, 2. Bl. Rep. 903. but will put the party to plead the coverture in *abatement*, Milner *v.* Milles, 3. Term Rep. 627. If the plaintiff has trusted a married woman or a *feme sole*, she shall, on being arrested, find special bail, Wilson *v.* Campbell, Mich. Term, 20. *Geo.* 3. MS.—See also Pearson *v.* Meadow, 2. Bl. Rep. 903. and Partridge *v.* Clarke, 5. Term Rep. 194. to the same purport.

Case 146. Anonymous.

Deceitfully receiving money from one man to the use of another, on a pretended order for such purpose, is not indictable at common law.

A WAS indicted for *deceitfully* coming to *B.* as sent from *C.* to whom *B.* owed money, to call for and receive the money, and receiving the money, *ubi revera C.* never did send him.

PER CURIAM. If he had come with *a false token* it had been criminal, and therefore indictable (*a*); but the question is, Whether this be such a cheat as is indictable? as playing with false dice is, for that is such a cheat as a person of an ordinary capacity cannot discover; but this is an indictment to punish one man because another is a fool.

S. C. 1. Salk. 379. Post. 301. Ante, 42. 61.

PER CURIAM. Let it stay.

3. Mod. 18. 11. Mod. 222. Ld. Ray. 1013. Burr. 1125. 1. Bl. Rep. 273. 1. Hawk. P. C. ch. 71. s. 2. 4. Com. Dig. "Indictment" (E.). Stra. 861 2. Term Rep. 581.

(*a*) By 33. *Hen.* 8. c. 1. falsely and deceitfully to obtain goods, &c. by colour or means of any *privy false token* or counterfeit letter made in another man's name to a special friend or acquaintance for the obtaining goods, &c. from such person, is an indictable offence. So by 30. *Geo.* 2. c. 24. knowingly and designedly by *false pretences* to obtain goods, &c. from any person, with intent to cheat and defraud any person of the same, is indictable. See Stra. 866. and Rex *v.* Young, 3. Term Rep. 98.

Case 147. Anonymous.

Trespass lies against bailiffs for breaking a house, &c.

BAILIFFS broke a house to execute their process, and THE COURT would not grant *an attachment*, but bid the party bring his action of trespass (*a*).

Hard. 2. Style, 447. 2. Co. 32, 33. Moor, 606. Dyer, 36. Palm. 53. 1. Bac. Abr. 232.

(*a*) Where the bailiff may break open a house, &c. vide Cro. Eliz. 753. 908, 909. Cro. Car. 386. 544. Cro. Jac. 280. 486. 556. 5. Co. 91, 92, 93. 7. Co. 6. 126. 2. Co. 66. 11. Co. 82. 12. Co. 131. 4. Bulst. 146. Hob. 62. 263. 2. Rol. 294. Owen, 63. Yelv. 28. Goldf. 79. 233. 4. Leon. 41. 1. Rol. 182. 1. Jo. 429, 430. Comb. 17. 327. 342. Post. 173. 210, 211. NOTE *to the former edition.*—See also Foster's Crown Law, 136. 320. Lee *v.* Gansel, Cowp. 1.; Cooper *v.* Boot, 1. Term Rep. 535.

Lett

Lett *against* Mills. Case 148.

LONDON, } to wit. } BE IT REMEMBERED, that on *Saturday* next after three weeks of *Saint Michael* in this same Term, before our lady the queen at *Westminster*, came *John Lett*, by *George Allgood* his attorney, and brought here into the court of the said lady the queen then there his certain bill against *Henry Mills*, one of the clerks of *Rowland Holt*, *Esq*. and *Robert Coleman*, *Gentleman*, chief clerks of the lady the queen, assigned to inroll pleas in the court of her the said lady the queen before the queen herself, present here in court in his proper person, otherwise called *Henry Mills*, of the *Inner Temple*, *London*, gentleman, of a plea of debt; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *London* (to wit), *John Lett* complains of *Henry Mills*, one of the clerks of *Rowland Holt*, *Esq*. and *Robert Coleman*, *Gentleman*, chief clerks of the lady the queen, assigned to inroll pleas in the court of her the said lady the queen, before the queen herself, present here in court in his proper person, otherwise called *Henry Mills*, of the *Inner Temple*, *London*, gentleman, of a plea that he render to him sixty pounds of lawful money of *England*, which he owes to him, and unjustly detains, for that, to wit, That whereas the aforesaid *Henry*, on the twenty-eighth day of *June*, in the second year of the reign of our lady *Anne*, now *Queen of England*, &c. at *London* aforesaid, to wit, in the parish of *Saint Mary le Bow*, in the ward of *Cheape*, by his certain writing obligatory, sealed with the seal of him the said *Henry*, and now here shewn to the court of the said lady the now queen, the date whereof is the same day and year, acknowledged himself to be held and firmly bound to the said *John* in the said sixty pounds, to be paid to the said *John*, when he should be thereunto afterwards requested: nevertheless the said *Henry*, although often requested, &c. the said sixty pounds to the said *John* hath not yet paid, but to pay the same to him hath hitherto absolutely denied, and yet doth deny, to the damage of the said *John* of ten pounds; and thereupon he brings suit, &c.

Bill against clerk of the king's bench.

In debt on a bond.

And the said *Henry Mills*, present here in court in his proper person, defends the force and injury, &c. and prays *oyer* of the said writing obligatory, and it is read to him, &c.; he also prays *oyer* of the condition of the same writing, and it is read to him in these words, that is to say, The condition of this obligation is such, that if the above-bounden *Henry Mills*, his heirs, executors, or administrators, do well and truly pay or cause to be paid unto the above-named *John Lett*, his executors, administrators, or assigns, the full sum of thirty pounds of good and lawful money of *England*, together with the interest thereof after the rate of six pounds *per centum per annum*, at or upon the twelfth day of *July* next ensuing the date hereof, then this obligation to be void, or else to remain in full force and virtue; which being read and heard, he the said

Oyer of the bond.

Henry

Lett against Mills.

Plea, that the plaintiff is a knight, in abatement.

Henry prays judgment of the bill aforesaid, because he saith, that the said *John*, to wit, on *Friday*, the twenty-second day of *October*, in the abovesaid second year of the reign of the said lady the now queen of *England*, &c. took upon himself the order of knighthood, and now is a knight; and this he is ready to verify: wherefore he prays judgment of the bill aforesaid, and that the said bill may be quashed, &c.

Demurrer.

And the said *John* saith, that by anything by the said *Henry* above in pleading alledged, the bill of him the said *John* ought not to be quashed, because he saith, that the plea aforesaid, by the said *Henry* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to quash the said bill of him the said *John* against the said *Henry*; to which said bill the said *John* hath no necessity, neither is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore for want of a sufficient answer in this behalf, he the said *John* prays judgment, and that the bill of him the said *John* may be adjudged good, and that the said *Henry* may answer to the said bill, &c.

Joinder in demurrer.

And the said *Henry* saith, that the plea aforesaid by him the said *Henry* in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law to quash the bill of him the said *John* against the said *Henry*; which said plea, and the matter therein contained, he the said *Henry* is ready to verify and prove, as the court, &c. And because the said *John* hath not answered to that plea, nor hath hitherto in any manner denied it, he the said *Henry* as before prays judgment, and that the said bill may be quashed, &c. But because the court of the said lady the queen now here is not yet advised to give their judgment of and concerning the premises, day is thereupon given to the parties aforesaid before the lady the queen at *Westminster*, until next after , to hear their judgment of and concerning the premises, for that the court of the said lady the queen now here is not yet, &c.

Respondeat ouster.

Case 149.

Lett *against* Mills.

Michaelmas Term, 2. Anne, Roll 333.

A plea in abatement, that the plaintiff received order of knighthood, good.

THE defendant pleaded in abatement, that *suscepit ordinem militarem, et jam miles existit.*

And upon demurrer, IT WAS RESOLVED,

FIRST, That *suscepit ordinem militarem* was a very proper way of expressing that he had received the order of knighthood. See the statute *de Militibus*.

S. C. 1. Salk. 6. S. C. 2. Ld. Ray. 1024. Post. 306. 1. Mod. 286. Ld. Ray. 853.

SECONDLY,

SECONDLY, "*Miles*," without addition, is to be understood of *a knight bachelor*, which is part of a man's name. "*Miles*" means "*a knight bachelor*."

THIRDLY, That there needs no *venue* where he was dubbed *a knight*, because any thing that concerns the condition of the person shall be tried where the action is laid. In a plea of abatement to the *person*, a *venue* need not be laid. 1 Saund. 49.

—FOURTHLY, That if *a knight* be sued, and not so called, it is a good plea in abatement. A *knight* must be so styled in law proceedings.

V. 2. Saund. 8. acc. 40, 41.

But it not being said that he was A KNIGHT *tempore exhibitionis billæ*, or *after the last continuance*, A plea that the plaintiff was a *knight*, must say that he was so *at the exhibition of the bill*.

THE COURT ordered a *respondeas ouster*.

* Anonymous. Case 150.

NOTE, Here it was said, that *a bill* filed against an attorney must be filed in full Term, and it is not enough it should be on any of the essoin-days *(a)*. A bill against attorney must be filed in full Term

Post 114. 175. 2 Salk 544. 12 Mod 163 Gilb K B 346. Holloway v Crop, 2 Burr 1052.

(a) But now *a bill* may be filed against an attorney in Vacation as well as in Term time, Lane v Wheat, Mich Term, 23 *Geo* 3 Dougl 313 *notis*, but if it be filed in Vacation otherwise than to avoid the statute of Limitation, the plaintiff will not be allowed his costs, if the action be settled before the ensuing Term, Tidd's Practice, 80 : and if *a bill* be filed against an attorney in the Vacation, the day of filing it may be inserted in the memorandum, Dodsworth v. Bowen, 5 Term Rep 325.

The Countess of Bridgewater *against* The Duke of Bolton. Case 151.

SPECIAL VERDICT upon a *feigned issue* out of CHANCERY, to try, Whether the late *Duke of Bolton* did, by his last will, devise certain fee-farm rents to *J. Earl of Bridgewater* in fee. A testator being seised of certain *fee-farm-rents*, of *lands*, and of *mines*, devises his *lands* to *A* for life, with a remainder in tail, and all his *mines* and five thousand pounds to his son-in-law *B*. "all which I give and devise to *B* his executors and assigns, together "with all my plate and jewels, and *all my other estate*, real and personal, not otherwise disposed of, "*to be given by him to his children as he shall think convenient, I solely trusting to his honour and discretion, that he will give them such provision as will be necessary for them* AND WHEREAS I have contracted "for the sale of my *fee farm-rents*, my will is, that if my debts shall not be satisfied out of my other "estate, my executors (whereof *B.* was one) shall and may sell some part or all of them for pay- "ment of them, notwithstanding *the rents* are not devised by this my last will." THE QUESTION was, Whether *B* was intitled to the *fee farm-rents in fee*? And IT WAS HELD, that *the rents* passed by the words "all my real and personal estate," for the word "*estate*" is *genus generalissimum*, and includes all things real and personal. S C 1 Eq Cas Ab 177 S C Holt, 281 S C 1 Salk. 236. 3. Mod 228. 1. Lev. 212. 2 Vent 285 Aleyn, 28 2 Danv. 527 Skinner, 194. 562. Post 111. 1. Sal 234. Ld Ray 187 831 1325 Prec Chan 37 68 202. 264 471. 8. Mod 92. 10. Mod. 94. 287 525. 11. Mod 90 102 12 Mod 592 Gilb Eq Rep 30 77. Fitz 151 Comy Rep. 337 2. Peer Wms 198 3 Peer Wms. 26 56 61 91 295 322 379. 4. Ven. 564. 2 Peer. Wms. 524. Cases T. T 162 Dougl 323 1 Term Rep 411. 2 H Bl. Rep. 223. 2 Term Rep. 656. 5 Term Rep 356.

The

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The special verdict found, that the said *Duke of Bolton*, at the time of his death, was seised of several lead and coal mines, and several mills in the county of *Westmorland*, and of divers fee-farm rents in *Berkshire*, and of divers other lands and tenements, and made his will *in hæc verba:* FIRST, He gives several lands and tenements to *Lord W. Pawlet*, with remainder to the first and every other sons in tail, &c. he further gives him eight thousand pounds to be paid by his executors. Then he gives to *J. Earl of Bridgewater*, his son-in-law, five thousand pounds, and all his mines which he held of the *Earls of Burlington* and *Thanet*, *&c.* And then comes the clause in question: "All which I give and "devise to my said son-in-law *J. Earl of Bridgewater*, his execu-"tors and assigns, together with all my plate and jewels, and all "other my estate, real and personal, not otherwise disposed by "this my last will, for to be given by him to his children as he "shall think convenient, I solely trusting to his honour and dis-"cretion, &c. that he will give them such provision as will be "necessary for them." And another clause was, "WHEREAS "I have contracted for the sale of my fee-farm rents, my will is, "that if my debts shall not be satisfied out of my other estate, my "executors" (whereof *the Earl* was one) "shall and may sell "some part or all of them for payment of them, notwithstanding "the rents are not devised by this my last will."

THIS CASE having been three several times argued at the bar,

HOLT, *Chief Justice*, now delivered the opinion of THE COURT thus: Four things are considerable upon this will.

FIRST, Whether by this clause, whereby the residue of *the Duke's* estate, both real and personal, is devised to *the Earl of Bridgewater*, the fee-farm rents do pass by virtue of the general words, "residue of all my real and personal estate," leaving out the words "not otherwise disposed of, &c."

*[107] * SECONDLY, Suppose they do pass, of what estate? Whether *in fee* or only *for life?*

THIRDLY, To consider the words, "not otherwise disposed of," together with the former words.

And FOURTHLY, Whether, considering other clauses scattered in the will compared with this, the rents will thereby pass?

As to THE FIRST MATTER, The *Duke of Bolton*, after several dispositions in his will, gives his personal estate to *the Earl of Bridgewater*, and then gives the residue of his estate, real and personal, to him: surely the rents pass by the word "*estate*," for that word is sufficient to pass *a freehold* as well as *a chattel*. The word "*estate*" is a *genus generalissimum* (*a*), predicable of two species that have their difference, whereby they are divided, that is, *estate real*, and *estate personal*. "Estate real" is *genus subalternum*,

(*a*) See Cowper *v.* Martin, 1. Term Rep. 411.

ternum, and has its species too; that is, ESTATE REAL *in fee*, or *for life*. And so is *estate personal* in like manner to be branched into *chattel real* and *chattel personal*; and it has that difference of a chattel real, not because it is a real estate, but because it has a real extraction. If a man seised in fee make a lease for years, the lessee for years has a chattel real; because his estate is derived out of a real estate; but still it is not a real estate; for it is testamentary, and devisable by will, at the common law, by the owner; so that if it were of lands in *knight's service*, or *in capite*, the owner could not devise the land for a term; but if he made a lease for years of it, then it became a chattel in the lessee, and consequently devisable: so that the words "real estate" cannot be satisfied without a freehold at the least pass; for a chattel real is no real estate. This is no new question; for it appears 1. *Ro. Ab.* 854. *Style*, 493. that the word "*estate*" comprehends both freehold and chattels real and personal, especially if the words "real "and personal" be added. It is true, that by a devise of a man's "estate real and personal" a freehold will pass, if these words come not accompanied with other particular words which express a species of an inferior nature, and which only can extend to a chattel; and there the generality of this word "*estate*" shall be restrained and explained by the precedent particular words, according to the rule in 2. *Co.* 46. 1. *Saund.* 160. 2. *Saund.* 411. and abundance of other books. I * answer, The rule is good and general, * [108] especially where the particular words comprehend and express a thing of an inferior nature to the general words subsequent, and the general words are put without their dividing differences; for there indeed the generality of them shall be controlled by the bounds of the particular precedent words; but where the general words do put the proper difference of particulars, and besides, take a higher species than the particulars mentioned before, as in this case it does, by the word "*estate*," which is a higher word than mentioned in the precedent particulars, and "real and personal" the proper difference, there the general words shall over-reach the particulars before; as if in the *Archbishop of Canterbury's Case* (*a*), the words had been, "and all ecclesiastical persons of superior or "inferior rank," they would have taken in archbishops, bishops, &c. A man seised in fee of lands, and of other lands by mortgage not forfeited, devises first all his lands in fee to *A.* and all the rest of his goods, chattels, estates, mortgages, debts, &c. to *C.*; it was held (*b*), that no freehold passed, and very rightly; for there the word "*estate*" came with particular words, without putting the due difference, as is done here. It may be objected, that the word "*residue*" is a word of relation, and therefore to be confined by its relation to something given before; and whatever is before given is *personal*, therefore the word "*residue*" is to be understood of personal estate. But I answer, that this word "*residue*" is

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(*a*) 2 Co. 46. 447. 1. Roll. Abr. 834.
(*b*) Wilkinson *v.* Maryland, Cro Car.

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not to be underſtood as only applicable to the next immediate clauſe of deviſe to *the Earl of Bridgewater*; and ſuppoſe it were ſo, yet that would not hinder *the Earl* from taking an eſtate of freehold, for it muſt refer to all the other clauſes whereby an eſtate is before given; and an eſtate of freehold is deviſed before; why then may not "*reſidue*" relate to it? Suppoſe a man deviſe "the "*manor of Dale* to *A.* and the heirs of his body," and has other lands, and deviſes "*the reſidue* of his eſtate to *J. S.* and his heirs," ſhall not both the reverſions paſs, and relate to the firſt as well as the laſt, as alſo his other lands (*a*)? therefore the word *reſidue*, if it muſt relate, muſt relate to eſtate both real and perſonal (*b*). But for argument ſake, ſuppoſe it ſhould only relate to a thing of the ſame kind that is deviſed to *the Earl* before in this clauſe: a man has an eſtate conſiſting of two parts, that is, real and perſonal; his perſonal eſtate is as much a part of his general eſtate as his real eſtate is; and ſuppoſe he gives ſome of his perſonal eſtate away by will, and in the ſame will gives the reſidue of his eſtate real and perſonal away, ſhould not this paſs the freehold as well as the reſt of his perſonal eſtate? Surely there is no doubt of it (*c*).

Vide Hob. 65.

But it is an objection, that this clauſe is not only in company with a clauſe that gives no more than a perſonal eſtate, but alſo that it gives it to him, his executors and aſſigns, and therefore coming with that clauſe, "all which I give to the ſaid *Earl*, his executors and "aſſigns, *together* * *with* my plate and jewels, and all the reſt of "my eſtate real and perſonal," under a *unà cum*, with chattels, with the legal and proper words of limitation for chattels, no more than a chattel ought to paſs by them. But I anſwer, let us firſt conſider how this clauſe "*reſidue of all his real and* "*perſonal eſtate*" is to be applied; whether we ſhall take it in an *accuſative* governed by the verb "*do*," or in the *ablative*, by the *una cum*; and I think it an *accuſative*, and not an *ablative*, and that even in Latin it will be good grammar ſo; in this manner, "*omnia quæ do et lego J. C. B. unà cum gemmis et argent'*, *et totum* "*reſiduum ſtatûs mei realis et perſonalis*:" and this is good ſenſe and grammar, and conſiſtent with the meaning and intent of the teſtator. But ſuppoſe it be put in *the ablative*, the freehold in the rents will paſs; as if a man has a real and perſonal eſtate, and deviſe his perſonal eſtate *unà cum* his real eſtate, the one and the other paſs as fully as if there were expreſs words of deviſe or grant to both of them (*d*). If a man make a feoffment in fee of the manor of *D. unà cum* the manor of *S.* and makes livery *ſecundum formam chartæ*, both ſhall paſs, though it be under a *unà cum*: If a man is poſſeſſed of a term for years of ſuch a houſe, and he de-

*[109]

(*a*) If a teſtator deviſe "all he is "worth," it will paſs real as well as perſonal eſtates, Huxtep *v.* Brooman, 1. Bro. Caſ. in Ch. 437.

(*b*) See Davies *v.* Saunders, 2. Bl. Rep. 737. Cowper, 420.

(*c*) See Tanner *v.* Morſe, Caſes Temp. Talb. 284. S. C. under the name of Tanner *v.* Wiſe, 3. Peer. Wms. 295. and Doe on demiſe of Bucket *v.* Chapman, 1. H. Bl. Rep. 223.

(*d*) Stukeley *v.* Butler, Hob. 174, 175. Moor, 860.

viſes

vises his term for years *und cum* his house called *B.* which is fee, they shall both pass; and there is no difference between where words are particular, and where they are general, if the general words cannot be satisfied without passing the real estate, as here they cannot.

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SECONDLY, Whether in case a freehold in the rents do pass, it is of an estate in fee, or for life? AND WE ALL HOLD, that an inheritance passes to *the Earl of Bridgewater*. If a man be seised in fee, and devise "his *estate*," the inheritance shall pass without any other circumstance to manifest his intent; merely by devising his *estate (a)*. Without this construction the words of the will cannot stand; for the word "*estate*" implies a fee simple, for that is the general estate that every man is supposed to be seised of *(b)*. "Estate" comes from "*stando*," because it is fixed and permanent, and imports the most absolute property that a man can have. It is true, an estate for life is an estate, but it is with an addition; and "*estate*" in a deed must be intended of an absolute fee-simple; *ideo* in a will, &c. Most certainly in grants it would not pass a fee, because the law appoints, that let the intent of the parties be ever so fully expressed and manifested in grants, without the word "*heirs*" a fee shall not pass *(c)*. If a feoffment be made "to *J. S.* to have to "him in fee-simple," which words can have no other sense than to pass *an inheritance*, yet an estate only *for life* shall pass *(d)*; and yet "fee-simple" in pleading is that which describes the inheritance, as *seisitus in dominico suo ut de feodo (e)*; but in *a will* it is not so. The reason is, because a will for lands is a new conveyance created by the statute of 32. *Hen.* 8. c. 1. 7. 1. whereby a man is enabled to devise all his socage land "at his *will* and "pleasure." Now when a man manifestly shews his intent, that the devisee shall have the inheritance, or a * greater estate than for life, the statute that impowers him to devise his estate "at his "pleasure," shall make his disposition good, without tying him up to the forms of common law; and this is agreeable to the common law in cases where estates were devisable by custom; for there express words of limitation are not necessary; for a devise of such lands "to a man, *et sanguini suo*," passed an estate tail *(f)*.

* [110]

In the next place, there are words of relation; it is not only "*the estate*," but "*my estate*." The *Duke of Bolton* was seised in fee of these rents, and he devises "his *estate*," that is, he gives that estate that was his, and that must be construed a fee, for if a man ask the question, What *the Duke* gives *the Earl?* the answer is, "*his estate*." If it be asked, "*What estate?*" it will be answered, "*fee*." Now to construe this to be only *for life*

1. Sal. 234. 236. Cro. Car. 129. 293. 1. Jon. 195. Hob. 75. See the case of Bertie and Faulkland, 3. Chan. Cases.

(a) See 1. Roll Abr. 835. pl. 5. 3. Mod. 45. and Cowper *v.* Martin, 1. Term Rep. 411. Fletcher *v.* Smiton, 2. Term Rep. 656.

(b) Co. Lit. 9.

(c) Litt. Tenures, sect. 1.

(d) 4 Com. Dig "Estates" (A. 2.)

(e) Litt. Tenures, sect. 10.

(f) See 1 Roll. Abr. 834. pl. 17.

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or *in tail*, would directly contradict the testator's words; for then an estate for life would not be *the Duke's* estate, but a new and a less estate; for it was an estate *in fee*, and you would have an estate *for life* pass, which would be a new estate. And though there be no difference between devising "his estate," and devising "all his estate," yet the word "*all*" makes the devise much more comprehensive; and if he give "*all* the residue," he must give *a fee-simple*, for an *estate for life* were not *all*; for every estate in fee consists both of *freehold* and *inheritance*, and therefore if he did not give *the fee*, he did not give *all*. It is objected, that the word "*estate*" is understood not of *the interest* which a man has, but of *the thing* itself: if a man give by will "all his *estate* in such "a house," then *the interest* passes; but if he devise "all his "estate," without ascertaining in what, *the thing*, and not *the interest*, shall pass. But I do not think so; for the word "*estate*" does in truth comprehend *the thing* and *the interest*; for it is impossible that one should have the original interest in a thing, and not have the thing itself, and still the word in its properest sense imports *the interest*. Suppose I covenant with *John Stiles* to convey him all the covenantor's estate in *Middlesex*, and the covenantor make him a charter by words of grant of "*totum stat. &c.*" will any man think the covenant satisfied? No sure, for that obliges him to convey a fee simple; therefore if he will perform his covenant, he must go in his grant beyond the words of the covenant. We know in pleading, that the word "*estate*" imports a fee, as in *a formedon* if the tenant plead that *John Stiles* was infeoffed with warranty, *cujus statum* the tenant has, that shall be understood of a fee. But for another reason this must be *a fee*. And here I will quit the word "*estate*," and suppose the devise to be of his *fee-farm rents*; and so I hold a fee-simple would pass as this devise is, for this reason: for *the Earl* is injoined to make
Hob 65 provision for his younger children out of the estate devised to him. Suppose a man seised of the *manor of Dale*, devises it without any limitation, to make provision for *J. S.* in such manner as he shall think convenient, and declares that he leaves it entirely to him:
* [111] Surely a very good *fee* will * pass; for in all cases where lands are devised to a particular purpose, and the death of the devisee may prevent that purpose, there the devisee will have a fee; and that is *Collier's Case* (*a*). And if here *the Duke* had appointed a certain sum to be paid, it had been within the express words of
Cro. Eliz. 378. 5. Chan. Rep. 102, 103, &. *Collier's Case*; but though that be not done, yet here is a trust reposed in him; and how can he discharge that trust if he has only an *estate for life*? A devise to a man "to dispose at will and "pleasure," is *a fee* (*b*), and this is "to dispose as he pleases." A devise was made of land to his wife "to dispose thereof upon herself and "her children;" and it was held, that she had a fee subject to a particular trust for the children (*c*).

(*a*) 6 Co. 16.

(*b*) Latch, 134. See also 2 Com. Dig. "Chancery," (4 W. 2.)

(*c*) Moor, 57. pl. 165. See also 2 Com Dig. "Chancery," (4 W. 2.) 3 Com. Dig. "Devise," (N. 4)

THIRDLY,

THIRDLY, We will consider this clause as qualified by the words "not otherwise disposed of;" that is, taking it for granted that a fee passes by the words "the residue of all my estate real "and personal," how will it be if the words "not otherwise dis- "posed of" be added? It has been insisted on, that these rents are "otherwise disposed of" by the will; for *the Duke* devises, "that his executors, if occasion shall be, shall sell any part, or all "of them, for payment of his debts and legacies:" so this is said to be disposition enough to make them out of the general clause of the will. But surely if this authority given to the executors be not a disposition, then the rents are not exempted out of the words of the general clause; and it is plain, that giving an executor power to sell, is no disposition; for the executor in this case takes no estate, but has only *an authority*, which when executed, and the executor, in pursuance thereof, has made a sale of the rents, then and not before are they disposed of, and excepted out of the general clause of the will; but if the executors do not sell, or if there be no occasion for them to sell, in which case they cannot sell, then there is no disposition. One, seised of divers messuages in several parishes, devised some of them in fee, and some for life, and then devised all his messuages not before disposed of; and it was held (*a*), that the reversion of the houses devised for life would pass. Indeed, the executors, in case of deficiency, are enabled to dispose of these rents; but if they do not, or if there be no occasion, they are not disposed of, and therefore given to *the Earl*. *A.* seised of the manor of *Dale*, and other lands, devised part of them for six years, and then devised the rest; and it was held (*b*), that by the word "rest" the reversion of the part devised for years passed. If a man seised in fee of several lands and tenements in *Dale*, devise all his lands to *B.* and his heirs; "but if my personal estate be "not sufficient to pay my debts, then I intend that *Black-Acre* shall "not pass;" if the personal estate be sufficient, it shall pass. It is plain the executor had not power to sell them, but upon a *condition precedent*; that is, in case his debts and legacies could not be paid within six months after his death: and pray how comes the now *Duke of Bolton* to claim them if they were disposed of by the will? If they are disposed of, he can have no claim; if not, they are devised to *the Earl*: but who shall have them during the six months, * until it be known whether they shall be disposed of, or not? Surely *the Earl* shall, for until then they are not disposed of. And where, in another clause of the will, *the Duke* takes notice that he has not disposed of these rents by these words, "notwithstanding that I have not devised them by this my last "will;" I answer, that it is plain from what has been said, that, by the general words, they are disposed of. But then what can be the meaning of these words? It must be, notwithstanding that they are not particularly devised to that purpose, or otherwise than generally; and it is no new matter to reject loose words out of a

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Ante, 106.

*[112]

(*a*) 2. Vent 285. (*b*) Allen, 28.

 will,

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will, rather than the intent of the testator should be frustrated, *Hob.* 65. So these words may be rejected here. But some will say, Surely it was not the intent of *the Duke* to devise these rents to *the Earl*, since he takes notice that he had contracted for the sale of them, and the devise to *the Earl* could not have prevented the contracts taking effect, I answer, It is plain, notwithstanding the sale or contract, that he did devise them; for if the debts and legacies were not paid within six months, he devises his executors to sell them; and in case he, with whom the contract is made, do not perform, then he devises to *the Earl*; and if the rents had been sold according to the contract, it had been no prejudice or diminution of *the Earl's* legacy, for the surplusage after debts and legacies paid would come to him as residuary legatee.

FOURTHLY, Considering the last clause of the will, whereby he orders these rents in case of deficiency, &c. to be sold, and the remainder thereof, after the debts and legacies paid, to go to *the Earl:* I say, considering this clause, with other scattered clauses in the will, *the rents* thereby will pass. Some doubts have been made, whether the word "*remainder* of my rent" be sufficient to pass these rents: FIRST, because *a remainder* is a residue of something, so that if there be nothing sold, nothing can be a residue, or a remainder: this depends upon the construction of the word "*remainder*," whether there be a necessity to sell to make a remainder. But I do not think the word "*remainder*" here is to be taken for *a remnant* of a *totum*, when part is extracted from it; for if the rents are not sold, then they remain unsold; and the word "*remainder*" shall be understood for the rents remaining unsold. This word "*remainder*" made some dispute, which lasted for above an age: it was a great question, Whether there could be *a remainder* of a thing created *de novo* (*a*); for there cannot be a remainder of a thing that never had been before. Since, a more reasonable construction has been made. If a man by deed grant *a rent* "to *A.* and the heirs of his body, remainder to *B.* and his "heirs," this is a good remainder (*b*).

1. Lev. 144. Cart. 52. 2. Keb. 29. 55. 84. 2. Salk. 577. Plo. 35. a. 15. E. 4. 9. *contr.*

* [113] * The devise is here of the *fee-farm rents*, to make thereout such annual payments as the devisee pleases; if it were a sum *in gross*, it would be *a fee* according to *Collier's Case* (*c*), and *Spicer's Case* (*c*). If only an estate for life had come to *the Earl*, the security of payment of the annuities must be diminished, and can it be intended but that *the Duke* intended the security should continue as long as the annuities were to be paid? which could not be, if *the Earl* had only an estate for life; for suppose

(*a*) Plowd. 35.
(*b*) 1. Sid. 285. See also 2. Mod. 30. 4 Mod. 280. Dyer, 311. 3. Peer. Wms. 230. and Co. Lit. 241. a. note (4.) 298. a. note (2.).
(*c*) 6. Co. 16. See also Moor, 852. Palmer, 392. and the case of Spicer *v.* Spicer, Cro. Jac. 527.

they,

they, to whom the annuities are payable, should out-live *the Earl?*

ET PER TOTAM CURIAM, the plaintiff had judgment (*a*).

(*a*) As to the operation of the word "estate," see Cheshire *v.* Painter, 2. Peer. Wms. 335. Barry *v.* Edgworth, 2. Peer. Wms. 523. Tanner *v.* Wise, 3. Peer. Wms. 295. S. C. Cases T.T. 284. Goodwin *v.* Goodwin, 1. Vezey, 228. Frogmartin *v.* Wright, 3. Wils 414. Mance *v.* Tall, Ambler, 181. Hogan *v.* Jackson, Cowp. 352. Right *v.* Sidebotham, Dougl. 734. Holdfast *v.* Martin, 1. Term Rep. 411. Fletcher *v.* Smiton, 2. Term Rep. 656. Doe *v.* Chapman, 1. H. Bl. Rep. 223. Palmer *v.* Richards, 3. Term Rep. 356. Doe *v.* Woodhouse, 4. Term Rep. 92. Andrew *v.* Southouse, 5. Term Rep. 292.

Carleton *against* Mortagh. Case 152.

Michaelmas Term, 2. Anne, Roll 76.

WANT of an original was assigned for error, and a release of error pleaded.

The doubt was, Whether the Court, after a release of error pleaded in this case, might award *a certiorari ad informandum conscientiam Curiæ*, to be certified if there were an original to support a judgment for a just debt?

AND IT WAS AGREED, that the party could not demand it of right after this plea.

A diversity was endeavoured at, that where the party himself expresly confesses or admits a thing, the Court ought not to desire any further information; but that where the admittance is not express, but implied, or by *nient dedicere*, it is otherwise.

Against which, HOLT, *Chief Justice*, put this case: In annuity, "*riens arriere*" is pleaded; the jury find, that there was no rent behind, and it appears to them that there was no grant; yet they cannot find a *non concessit* contrary to the admittance of the party: and he said, if error be assigned which in truth is no error, and the defendant plead a release of errors which is found against him, yet, the error assigned being bad, judgment shall be affirmed, because the issue taken upon the release was impertinent.

POWELL, *Justice*, quoted the *Year-Book* (*a*), that upon a release of error, if it be found against the defendant, yet the Court shall proceed to examine the judgment; but if it be found for the defendant, the judgment shall be to bar the plaintiff of his writ; but if there be no error at all, and the release be found against him, the judgment shall be affirmed.

And it was put in the paper to be spoke to solemnly.

If *want of an original* be assigned for error, and a *release* be pleaded, yet a *certiorari* to inform the Court whether there was any *original*, or not, may be awarded, in the same manner as if *in nullo est erratum* had been pleaded; but the party cannot demand it of right. S. C. post. 206. S.C. 1.Salk.268. S.C. 3.Salk.399. S. C. Holt, 275. S. C. 2. Ld. Ray. 1005. Post. 174. 235. 1. Salk. 267. 269, 270. Hob. 164. 1. Cro. 84. Moor. 700. 1. Leon. 22. Hob. 54. 2. Lev. 234. 5. Com. Dig. "Pleader," (3. B. 19.)

(*a*) By LITTLETON, *Justice*, in the case of Moyle *v.* Danby, 8. *Edw.* 4. pl. 8.

CARLETON *against* MORTAGE.

At another day, WARD quoted the authorities in the margin (*a*), which were all upon the same opinion with the *Year-Book* before quoted by POWELL, *Justice* (*b*).

And being moved again the last day of Term,

* [114]

1. Salk. 269, 270. Post. 206.

HOLT, *Chief Justice*, said, that if the plaintiff in error assign that for error particularly which is not so, or the general error, and the defendant plead not "*in nullo est * erratum*," but a release, which is either insufficiently pleaded, or if well pleaded, upon issue found against him, there the Court ought not to reverse the judgment without examining if the error be good: now why should not we have *a certiorari ad informandum conscientiam*, though the party of right cannot demand it (*c*). Suppose want of original be assigned for error, and it be returned, that there is no original of that Term, the defendant in error, if there be an original of another Term, ought to make such a suggestion on THE ROLL, of an original of another Term; for if he plead "*in nullo est* "*erratum*," he is thereby concluded from making such a suggestion; yet the Court may award *a certiorari*, because there may be an original of another Term.

Sed adjournatur till next Term (*d*).

(*a*) 1. Roll. Abr. 789. Cro. Jac. 415. 1. Jones, 352. 373. Bro. Abr. "Error," 165. Year Book 7. *Edw.* 4. pl. 16. 6. *Edw.* 4. pl. 3. 8. *Edw.* 4. pl. 8. 9. *Edw.* 4 pl. 32.

(*b*) 8. *Edw.* 4. pl. 8.

(*c*) Bishop's Case, 5. Co. 1. Jones, 139.

(*d*) See this case moved again, post. 206. where it is determined by three Judges, against the opinion of HOLT, *Chief Justice*, that the Court may in this case grant *a certiorari* to inform the conscience of the Court: and by S. C. 2. Ld. Ray. 1006. the writ was afterwards granted accordingly.

Case 153.

Anonymous.

Privilege pleaded.

1. Salk. 1. 4. 30. 2. Salk. 515 545. Ld. Ray 135. 337. 898. 1173. 11. Mod 167. Stra. 864.

AN ATTORNEY of the common pleas pleaded to the jurisdiction of the court.

PER CURIAM. He shall not be *sworn* to his plea, nor need the *writ of privilege* be set out at large: and if matter of fact be pleaded in *abatement* (*a*), and found against the defendant, judgment final shall be given.

(*a*) See Camerford *v.* Price, Dougl. 314. *notis*.

Case 154.

Anonymous.

If a trader *sell* goods upon credit, the property is in the *vendor*, although the *vendee* give a false account of himself. Ante, 105.—1. Salk 379. Ld. Ray. 1013.

A MAN comes to a merchant, or other dealer, and by *false insinuations*, and account of himself, prevails with the merchant to *sell* him goods upon *tick*.

HOLT,

HOLT, *Chief Justice*, seemed to incline, that that was not such *a cheat* as would alter the property (*a*).

(*a*) But see the case of Parker *v.* Patrick, Easter Term, 33. Geo. 3. where it is decided, that if goods are obtained by false pretences, and pawned without notice of the fraud, and on the offender being convicted of the cheat, the original owner get possession of his goods again, the pawnbroker may maintain an action of trover against him to recover them back. 5. Term Rep. 175.

The Queen *against* Tracy. Case 155.

PER CURIAM. After an indictment by THE GRAND JURY, a plea is not to be received in the office (*a*), without the defendant gives security to try it at his own charges. After an indictment, &c. how defendant's plea may be received.

But if the defendant come into court, and plead, his plea shall be received, but he shall be committed if he do not give security to try it. S. C. ante, 30. S. C. post. 178. S. C. 3. Salk. 192.

If the defendant give security to try it, it must be at his own charge; if he go to gaol, it must be at the prosecutor's charge. S. C. Holt, 706.

(*a*) See Rex *v.* Haddock, that on an indictment for a *mayhem* laid to be done feloniously, the defendant need not be brought to the bar to plead, but may deliver his plea into the office. 2. Stra. 1100. Andr. 137.

*[156]

Emerton *against* Selby. Case 156.

AVOWRY was for common, setting forth a prescription of common for cattle *levant et couchant* upon such A COTTAGE. Prescription of common for cattle *levant et couchant*, upon a cottage, is good; for a cottage must have *land* belonging to it.

PER CURIAM. It is good to *a messuage* or to *a cottage*, for cattle *levant* or *couchant*; but it was questioned in the year 1653, whether it could be good of common without number; and the same has been of late in the common pleas, but nothing done in it. A *cottage* implies a court and backside, for a cottage with less than four acres of land, is against the statute of 31. *Eliz.* c. 7. (*a*). S. C. 1. Salk. 169. S. C. Holt, 174. S. C. 2. Ld. Ray. 1015.

* HOLT, *Chief Justice*, said, that he had known *levancy* and *couchancy* tried in an issue (*b*) before HALE; and that HALE said, the fothering cattle in the backside would suffice. 3. Keb. 44. 1. Bulst. 50. 2. Brownl. 101.

And judgment here for the avowant. Vaugh. 253. Co. Lit. 5.

And PER CURIAM, It would be hard to defeat it, in case it were prescribed to common without number (*c*). 2 Inst. 736. Co. Ent. 749. Ld. Ray. 726. 11. Mod. 53. 72. 12. Mod. 35.

(*a*) Repealed by 15. *Geo.* 3. c. 32.
(*b*) Winch. Entries, 972.
(*c*) See Patrick *v.* Lowre, 2. Brownl. 101. Daniel *v.* Hanslip, 2. Lev. 67. Richards *v.* Squib, 1. Ld. Ray. 726. Hockley *v.* Lamb, 1. Ld. Ray. 726. Scholes *v.* Hargreaves, 5. Term Rep. 46.

Morgan

Case 157. Morgan *against* Tomkins.

On outlawry on an indictment being reversed, the *indictment* stands.
S. C. Holt, 402.

BY THE COURT. If there be an outlawry upon an indictment, and the outlawry is afterwards set aside, the indictment stands good and open to proceed upon: but if judgment be upon an indictment by *nil dicit*, or any other judgment by the Court, and that be reversed, all is set at large, and there is an end of the indictment.

Case 158. Anonymous.

If a *traverse* be tendered to an inquisition of forcible entry, *restitution* shall not be granted.
Salk. 260. 588.
4. Com. Dig. "Forcible Entry," (D. 7.)

IT has been held in KELYNGE's time, that if a forcible entry were traversed, yet there should not be a restitution, in the case of *the King v. Carle (a)*. But the contrary has been held since, and before; and that there is no way to prevent restitution, but by *certiorari*, or pleading that the party had possession for three years before (*b*).

(*a*)

(*b*) See 31. *Eliz.* c. 11.

Case 159. Anonymous.

Execution upon *habere facias possessionem.*
Ante, 27.
Post. 298.

PER HOLT, *Chief Justice.* Upon an *habere facias possessionem*, the execution is not complete until the bailiff deliver the possession, and is gone.

Case 160. Anonymous.

Departure in pleading.
1. Salk. 222.
5. Com. Dig. "Pleader," (F. 11.)
4. Term Rep. 419.

PER HOLT, *Chief Justice.* If a man lay a day in his declaration that is not material, and the defendant, by his plea make it material, and then the plaintiff, in his replication, varies from the day in the declaration, it will be *a departure*; otherwise if the day had not been made material by the plea.

Case 161. Walden *against* Holman.

If a man sued by the name of *Benjamin* plead in abatement that he was baptized by the name of *John*, with A TRAVERSE that the said *John* was ever known by the name of *Benjamin*, the plea is bad.

HOLMAN was sued by the name of *Benjamin Holman*, and pleaded in *abatement*, that he was baptized and always known by the name of *John*; ABSQUE HOC that he the said *John* was ever called or known by the name of *Benjamin Holman.* The plaintiff replies, that he was known by the name of *Benjamin* from the time of his baptism. To which the defendant demurs.

It was urged, that the material part of the plea was, that he was baptized by the name of *John*; and if so, the plaintiff ought to answer that; for if the defendant were baptized by the name of *John*, he could not be known by any other name of bap-

S. C. Ld. Ray. 1015. S. C. 1. Salk. 6. S. C. Holt, 492. 563. Cro. Eliz. 897. Cro. Jac. 558. 2. Brownl 48. Post. 225. Noy, 135. 2. Roll. Abr. 135. 4. Mod. 347. Ld. Ray. 118. 249. 509. 1178. Stra. 556. 816. 1218. 1. Lut. 10. 3. Term Rep. 660.

tism,

tifm, for one can have but one name of baptifm; and the ABSQUE HOC coming after that, which is a material plea, is frivolous, and therefore not to be regarded. — WALDEN *against* HOLMAN.

And to this opinion POWELL, *Juftice*, ftrongly inclined, for he thought that to fay that he was baptized by another name, without more, was a good plea in *abatement*, and therefore the reft was nugatory (*a*).

* HOLT, *Chief Juftice*, and the reft of THE COURT, *contra*: for admitting that it might be relied upon for a plea that he was baptized by fuch a name, yet that is not done here, but it is only made an inducement to a traverfe, which matter of traverfe is not immaterial, but would be a good plea in *abatement*; for it is a good plea in *abatement* for a defendant to fay that he was known and called by fuch a name, though he never was baptized, as many thoufands in *England* never were: nor is it true to fay that one baptized by the name of *John* cannot be known by another name. *Sir Francis Gawdy* acquired a new name by his *confirmation* (*b*), without, as HOLT, *Chief Juftice*, faid, lofing his *Chriftian name*; at leaft he faid he was not fatisfied that his *name of baptifm* did ceafe upon his taking a new *name of confirmation*, as POWELL, *Juftice*, would have it (*c*). * [116]

BROTHERICK at the bar remembered a cafe wherein he was of counfel, in which it was held, that it is not a good plea in *abatement* for a defendant to fay that he was baptized by another name, without fhewing likewife that he was always known by it, and not put the plaintiff to fhew how his name was altered to enable him to fue them.

DARNELL, *Serjeant*, affirmed the fame thing.

And judgment was given to *anfwer over*.

(*a*) See Jones *v.* Macquillin, 5. Term Rep. 195.
(*b*) See Co. Lit. 3. a.
(*c*) See Difply *v.* Sprat, Cro. Eliz. 57. Fermor *v.* Dorrington, Cro. Eliz. 222. Watkins *v.* Oliver, Cro. Jac. 558. Blunt *v.* Snedfon, Cro. Jac. 116. See alfo 2. Roll. Abr. 135. 5. Co. 43. Poph. 57. Noy, 135. 1. Brownl. 47. the Year-Books 3. *Hen.* 6. pl. 26. 14. *Hen.* 7. pl. 11. and Bro. Abr. "Mifnomer," 2. 4. 7. 43.

Rofewell *againft* Pryor. — Cafe 162.

MIDDLESEX, *to wit.* } NATHANIEL ROSEWELL complains of *Samuel Pryor* and *Richard Avery* in the cuftody of the marfhal, &c. for this, that whereas the faid *Nathaniel*, on the firft day of *June* in the ninth year of the reign of — Cafe for ftopping up of lights (*a*).

(*a*) It is not faid ancient meffuage, neither ancient windows. And after verdict this was moved in arreft of judgment. But by the whole Court, it being after a verdict, it fhall be intended that it was given in evidence at the trial, that the houfe and windows were ancient. But WRIGHT, *Serjeant*, and NORTHEY, were of opinion, that the declaration would have been good upon a demurrer. Salk. 460. 714. Mod Cafes, 416. Pract. Reg. 16, 29.

the

ROSEWELL against PRYOR.

the lord *William the Third*, now king of *England*, &c. and continually from thence hitherto was possessed and yet is possessed of and in a messuage situate and being in the parish of *St. Martin in the Fields*, in the county of *Middlesex* aforesaid, for a term of divers years then and yet to come and unexpired, and of twenty-one windows in and upon part of the south side, and of eight windows in and upon part of the east side of the said messuage, in and through which said windows light into the said messuage, on the said first day of *June* in the ninth year abovesaid, was let and was accustomed to be let, and then and yet ought to be let for the enlightening of his said house, they the said *Samuel* and *Richard* not ignorant of the premises, but maliciously intending and contriving to deprive him the said *Nathaniel* of the use and benefit of the said several windows, afterwards, to wit, the said first day of *June* in the ninth year of the reign of the said lord the now king, at the said parish of *St. Martin in the Fields* in the county aforesaid, a certain edifice so near the said windows in the said house of him the said *Nathaniel* built and erected, and from thence until the first day of *October* then next following continued, and thereby the said windows were stopped up and darkened, whereby the said *Nathaniel* was deprived of and lost the use and benefit of the said windows from the said first day of *June* in the ninth year abovesaid until the said first day of *October* then next following; whereby the same *Nathaniel* says that he is prejudiced, and has damage to the value of one hundred pounds; and therefore he produces the suit, &c.

Not guilty pleaded, and verdict and judgment for the plaintiff.

Case 162.

Rosewell *against* Pryor.

Michaelmas Term, 13. *Will.* 3. *Roll* 362.

In an action for stopping the plaintiff's lights, it is sufficient to declare that he was *possessed* of such a messuage for years, and *had and ought to have* such lights, without stating that the *messuage* and the *lights* were *ancient*.

S. C. 2. Salk 459.
S. C. Comb. 481.
S. C. Carth. 454.
S. C. 12. Mod. 215. 635.

CASE for stopping the plaintiff's lights. The declaration was, that the plaintiff was *possessed* of such a messuage for a certain term of years, *et habuit et habere debuit* such and such lights thereunto.

The question was, Whether this was a good declaration, without saying that it was an *ancient messuage* with *ancient lights*?

HOLT, *Chief Justice*. If a man have a vacant piece of ground, and build thereupon, and that house has very good lights, and he lets this house to another; and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon, to the nuisance of the lights of the first house, the lessee of the first house shall have an action upon this case against such builder, &c. for the first house was granted to him with all the easements and delights then belonging to it: And IT

S. C. Holt, 500. S. C. 1. Ld. Ray. 392. 713. S. C. Lilly's Ent. 81. 516. Post. 193. 311. 313. Hob. 131 9. Co. 58. 1. Vent. 237. 2. Lev. 194. 1. Mod. 55. Hutt. 130. 5. Com. Dig. "Pleader" (C. 39.). 1. Term Rep. 428. 3. Term Rep. 766.

WAS

WAS AGREED, that formerly the way was to declare of *ancient lights* and *ancient messuage*, but now that was altered. *Vide* the Case of *St. John v. Moody* (a), PER CURIAM. ROSEWELL against PRYOR.

Judgment was given for the plaintiff.

(a) 1. Vent. 274. 2. Lev. 148. 3. Keb. 528. 531.

[* 117]

* Elwis *against* Lombe.

Case 163.

ERROR of a judgment in *trespass* in the common pleas, where it was for *vi et armis* taking away *ten mattocks* of the plaintiff in *R.* The defendant, as to nine, pleads *not guilty*; and as to the tenth, *actio non, quia locus in quo* is his *liberum tenementum*, and that the mattock was there *damage feasant.* And upon general demurrer

In trespass *vi et armis* for taking the plaintiff's goods in *Dale*, the defendant cannot plead in justification generally, that the place WHERE is his *freehold*, and that the goods were there *damage feasant.*

The single question was, Whether this general way of pleading *liberum tenementum*, without shewing any further certainty, be good?

And judgment was for the plaintiff in the common pleas.

SALKELD now argued *for the plaintiff in error*, the general error being assigned:—Either the *liberum tenementum* must take in all the vill of *R. viz.* that all the vill is the freehold of the defendant, and then without question the plea will be good; or it must be taken of a particular place not certainly known or described within *R.*; and take it to be the last, and so the more strongly against him, yet it will be well, especially upon a general demurrer. The plaintiff, in his replication, might have ascertained the place with the same advantage to himself as if the defendant had done it in his plea, by making a *novel assignment.* The bar is as certain as the declaration, and less certainty is required in *a bar* than in *a declaration*, especially when *the bar* is *a common bar* (a). Where-ever the plaintiff may be general in his writ and count, the defendant may be as general in his plea; and if the plaintiff look for more certainty, he himself must make it in his replication. Before the statute of 27. *Eliz.* c. 5. the old books run both ways; that is to say, the *locus in quo* is an acre of land in *Dale*, *liberum tenementum* of defendant, as they would have us have done here; or else generally *liberum tenementum*, as we have said. The Year Book 39. *Hen.* 6. 6. *a.* is full in point for me; and in the Year Book 4. *Ed.* 3. 11. *b.* and *Fitz. Bar*, 20. it is that in *clausum fregit*, or *de bonis asport.* "*son franktenement*" is a good plea. Indeed, some Books take this difference, that where the plaintiff shews the certainty of his title, there the defendant ought to be certain and particular in his plea, and to ascertain the place; otherwise where the plaintiff does not shew the certainty of his title. And in such case, if he plead *liberum tenementum* generally, he need not shew any

S. C. 2. Salk. 453. 1. Keb. 433. 2. Keb. 57. 3 Keb. 286. 3. Lev. 203, 204. Stra. 5. Ld. Ray. 727. 923. Cro. Eliz. 492. Bull. N. P. 92. Carth 176. 5. Com. Dig. "Pleader". (3. M. 34.) 1. Term Rep. 478. Bull. N. P. 17. 2. Term Rep. 172.

(a) Certainty to a *certain intent in general* is all that is requisite in *counts*, replications, indictments, and returns to writs of *mandamus* and *habeas corpus.* Certainty to *a common intent* is sufficient in pleas *in bar.* But certainty to *a certain intent in every particular* is necessary in estoppels. Dougl. 158, 159.

more

ELWIS against LOMAX. more certainty; but if he plead *freehold* by descent, gift, &c. he must shew certainty of place. The Books 3. *Hen.* 6. 34. and 5. *Hen.* 7. pl. 38. seem indeed against me; for in trespass for taking the plaintiff's cattle, the defendant pleaded, that the *locus in quo* was his freehold, and that he took them *damage feasant*, and it was held bad; for they compared the *damage feasant* to the making of a title, but that

[118] *damage * feasant* is not traversable, but a consequence of the freehold's being his. The reasons given in the Books for the foregoing diversity are two, and both of them fail. The first reason is, that *liberum tenementum* generally is not traversable, but that *liberum tenementum* by feoffment of *J. S. &c.* is traversable, and therefore it

8. Co. 47. b. 48. 3. Lev. 203, 204. ought to be alledged so as to be traversed: but that *liberum tenementum* generally is traversable (*a*). The second reason given is grounded upon the first, that being not traversable, the only use of it is to force a replication: but that cannot be good; for since it is traversable, it is in the plaintiff's power to traverse it, and not to reply. And there is no plea of any other use but to force a replication, but such as are allowed by law as such, to avoid prolixity of pleading; as, "*performavit omnia,*" "*non fuit damnificatus,*" "*&c.*" But the true reason why *liberum tenementum* generally is a good plea is, that where the plaintiff is general in his writ or count, the defendant may be as general in his plea; and if the plaintiff will have more certainty, he must make it in his replication. Now to consider this case since the statute of 27. *Eliz.* c. 5. of Demurrers, before which there was no difference between matter and form as to point of demurrer, though, before that statute, one might *demur specially*, but it was never safe or necessary so to do in any case except that of *duplicity*; because if one had demurred

1. Salk. 219. specially, he could have insisted on nothing else but what he had specially shewn for cause in his demurrer; whereas if he had

1. Saund. 337. *demurred generally*, he was left at large to insist upon any thing except *duplicity*. Nor was this any way inconvenient; for while all the pleadings were *ore tenus* at the bar, though the demurrer were general, yet the matter was so scanned that the Court and

1. Vent. 240. Hob. 232. parties well knew what the cause of demurrer was. But after that way of pleading came to be disused, neither the Court nor the party could know it; and for that the statute was made, which restores the common law so far that people may know what a demurrer is for, whether for matter or form; for if the demurrer be for matter, the

Ld. Ray. 22. 357. 393. 10. Mod. 280. 323. entry is, *quia materia in placito, &c. minus sufficiens, &c.* There are indeed some exceptions to the rule, that a circumstantial fault in a plea will not vitiate upon *a general demurrer*; as where a deed is pleaded, and no *profert* made of it; but the reason of that is particular, *viz.* that by pleading a deed without *a profert*, you put a great difficulty upon the party to answer it (*b*). In replevin and avowry for rent the replication was *de injuriâ suâ propriâ*, ABSQUE

(*a*) Vide Dyer, 23. b. Cro. Jac. 59. Cro. Eliz. 137. 812. Rastal, 548.

(*b*) See 9. Co. Tresham's Case; 1. Lev. 132. 190. and the case of Horne v. Linne, in Hilary Term, 12. *Will.* 3. in King's Bench.

not that there was anything behind; and it was * held, that this was such a plea as would force an unnecessary replication, and, for that, would be bad upon a *special demurrer*, but good upon a general one. Besides, the plaintiff might have ascertained the matter by a *new assignment*, whereof the true reason is given in *Plowd.* 84. that where the plaintiff is general in his writ or count, the defendant may be as general in his plea. There are two ways of pleading *liberum tenementum*; the one without any manner of certainty, the other with a certainty. If there be any certainty, as that the place WHERE is *Black-Acre*, *liberum tenementum* of him, then the way to reply is to make *a new assignment*. If there be no certainty, the way is to ascertain the place, and to make himself a title to it in the replication *(a)*. And this can be no prejudice to the plaintiff, for the affirmative being upon the defendant, he must make title to the place WHERE the taking is, or he is gone: for which he quoted *Lane's Case (b)*, in *Judge Godbolt*'s manuscript: Trespass *quare clausum fregit* in *A. B.* and *C.*; the defendant pleaded, that the *locus in quo* was *Black-Acre*, *White-Acre*, and *Green-Acre*, his *freehold*; and issue thereupon; and because the defendant could not prove his *freehold* in them, as alledged, the verdict was against him; for the Court said, that though it be usual for the defendant to lay a feigned place in his plea, to force the plaintiff to *a new assignment*, yet it is dangerous so to do, for if issue be taken thereupon, and he cannot prove his plea, he is gone.

[illegible]

8. Co. 120. 133.
9. Co. 37.
Cro. Car. 209.
Co. Lit. 303.
Hetl. 174.
11. *Hen.* 7. 24.
7. Co. 25.

CURIA. You do not consider that you are in a *transitory action*, in which there is no such thing as a *locus in quo*. If it had been a *local action*, without doubt the pleading had been good. If a man declare *quare clausum* generally, in such a vill, the defendant may plead *liberum tenementum*, and if the plaintiff traverse it, it is at his peril; for the defendant, if he has any part of his land in the whole town, shall justify it there; and therefore in that case the better way is to make *a new assignment*. But now there is a fixed course established in the common pleas, as was also in this court formerly, that in *local actions* the plaintiff *shall* ascertain the place in his declaration, to prevent such general pleas, and the prolixity of *a new assignment*, and the defendant is confined to the place ascertained in the declaration (*b*): but here the defendant, by pleading *damage feasant*, has made that *local* that was at *large* before, and therefore he ought to ascertain it at his peril.

Sed vide Dyer, 23.
2. Bl. Rep. 1089.
Hob. 176.
See Bull. N. P. 92.

* And THEY ALL AGREED, that if a man bring trespass for taking his cattle in *Black-Acre* on such a day, and the defendant justify the taking at another place *damage feasant*, the plaintiff may make *a novel assignment*, if there were two takings. So if there were two batteries on one day, and the one were on the plaintiff's own assault, and the other not, if the defendant will justify one

*[120]

Vide Hob. 104.

(*a*) See the Old Book of Entries, 43. Rastal, 648. Dyer, 23. and the Year Book 3. *Hen.* 6. pl. 34.—And that in trespass *quare clausum fregit* the plaintiff *may* declare generally without *naming* the closes, see Martin *v.* Kesterton, 2. Bl. Rep. 1089.

(*b*) In Hilary Term, 4. *Car.* 1.

(*c*) See the case of Martin *v.* Kesterton, 2. Bl. Rep. 1092.

de

Lewis against Lamb.

de son assault demesne; he may make a new assignment of the other battery.

And by THE WHOLE COURT the judgment was affirmed (*a*).

(*a*) See Gargram *v.* Smith, 1. Salk. 92.; and Martin *v.* Kesterton, 2. Black. 1089. 221.; Lambert *v.* Stother, Bull. N. P. Rep. 1089.

Case 164.

Clement *against* Scudamore.

Hilary Term, 13. *Will*. 3. *Roll* 271.

If a person have five sons, and the youngest son die in the life-time of his father, leaving issue *a daughter*, and the father afterwards purchase and become seised of *copyhold lands* in the nature of *Borough English*, the daughter of the fifth son shall, on the death of her grandfather, inherit these lands *jure representationis*, and not the fourth surviving son; for the youngest son by *Borough English*, and his *representatives*, are as much *heirs* to the *Borough English* lands as an eldest son or his representatives are heirs to lands descendible at common law.

SPECIAL VERDICT, finding that the lands in question were *copyhold lands*, part of the manor of *Croydon*, in *Surrey*, of the nature of *Borough English*, and that the custom of the manor was, that all copyhold tenements of that manor did and ought to descend to the youngest son and his heirs; that one *F. W.* had issue five sons; that the youngest died, living the father, leaving issue a daughter; that after the youngest son's death, the father purchased the lands in question, and was thereunto admitted, to have and to hold according to the custom of the manor; that he after died seised; and that the fourth son entered, upon whom the daughter of the fifth son entered and made lease to the plaintiff.

So the question was, Whether the daughter of the youngest son, dying in the life of the father, has good title as *representative* of her father, who, if he had lived, would have inherited as heir to his father?

HOLT, *Chief Justice*, delivered the opinion of THE COURT.

We are all of opinion that the daughter has good title.

FIRST, It is to be considered, that where this custom of *Borough English* is for the youngest son to inherit, by this custom the youngest son is put into the room and stead of the eldest son at common law; for as an inheritance by common law shall go to the eldest son, so by this custom it shall go to the youngest, without any difference. Therefore since this custom alters the descent from *the eldest* to *the youngest* son, there is the same reason that the *representative* of the youngest shall take, as there is at common law for the representative of the eldest. And there ought not to be any difficulty herein, for it appears (though *Coke* (*a*) be of a contrary opinion), that all the lands in *England* before THE CONQUEST, and for some time after, were generally *gavelkind* (*b*); and that soon after THE CONQUEST, for the better strength and support of THE CROWN, *knight service* tenure was introduced, and the

S. C. 2. Peer. Wms. 63.
S. C. 1. Salk. 243.
S. C. Holt, 124. S. C. 2. Ld. Ray. 1024. Noy, 106. 1. Mod. 96. 102. 2. Sid. 61. Mar. 54. 45. Godb. 166. Dyer, 196. 4. Leon. 242. Co. Lit. 110. b. 140. Cro. Jac. 198. Cro. Car. 411. Jones, 362. Somer. on Gav. 7. 3. Peer. Wms. 62. 1. Wils. 64. 2. Com. Dig. "Burrough "English" (A.). 1. Bac. Abr. 329 458. 2. Bac. Abr. 33.

(*a*) Co. Lit. 110.

(*b*) Vide Lambard's Saxon Law, 167. Selden's Notes in Eadmerum, 184. Wright's Tenures, 31. 175. Robinson on Gavelkind, Append. 10. Mod. 417. 12. Mod. 623. Cases T. T. 276. 1. Peer. Wms. 64. 475. 3. Peer. Wms, 63.

course

course of descent altered, and the whole was made descendible to the eldest son, to the intent that these tenants in *knight service*, who by their tenure were to wait on the king in his wars, might do it with more dignity and grandeur (*a*). So in this instance the ancient *Saxon law* was then altered; but notwithstanding that hereby the eldest male was preferred before the youngest, and the male always before the female, yet the *right of representation* remained even to this day. Clements against Scudamore.

Secondly, This *right of representation* has been considered in all countries and nations. By the ancient *law of Israel*, in the *Book of Numbers* (*b*), an account is given of this matter of representation. It was a law that the male should inherit all, but upon failure of them the female; and it was a law, as some say, brought out of *Egypt*, but always practised, that the eldest son should have a double share; but this was not only *quatenus* he was eldest, but as he was representative too. It appears by *Selden* (*c*), that the daughter should in that case have a double portion; so that representation was always practised by the *Greeks* and the *Romans*, even by the Law of the Twelve Tables (*d*).

But in the third place, this *right of representation* has not only room in inheritances descendible according to the course of the common law, but holds also in inheritances descendible according to custom; for in case of *gavelkind*, which now we know to be the *custom of Kent*, if a man have three sons, and purchase land in *gavelkind*, and the youngest son, in the life of the father, die, leaving issue *a daughter*, no doubt *the daughter* shall inherit; but if the purchase had been to the father, and heirs males of his body, the daughter had been excluded *per formam doni*; but the custom making it descendible to the heir male makes room for the representative of him; and there is no difference between *gavelkind* and *borough-English*, but *secundum majus et minus*; in *gavelkind* all the sons take all; in *borough-English* the youngest takes all; and the law takes notice of both these customs; for which he quoted the case of *Fane v. Barr* (*e*), where the custom was for a copyhold to descend to the youngest son, and not to the eldest brother; and a copyholder surrendered the land to another and his heirs, but before admittance the surrenderee died, leaving two sons; and the question was between the two sons; and it was adjudged, that the eldest son should be admitted, because the custom was, that the estate should descend to the youngest brother, and there was no estate in the ancestor to descend; and therefore the eldest son must have taken as purchaser. But according to the report I have of the case, the Court said, that if the custom had been laid to have been *borough-English* the eldest had been excluded, for the law takes notice of *borough-English* and *gavelkind customs*. In this case, the custom

Noy, 15. Dyer, 5. b. 1. And. 191. 2. Lev. 87.

Vide stat. 31. *Hen.* 8. c. 3. 18. *Edw.* 6. c. 1.

Nota.

(*a*) See the *fifth edition* of Sir Matthew Hale's History of the Common Law, by Mr. Serjeant Runnington, ch. 11, page 230, 231, &c.

(*b*) Bk. Numbers, chap. xxvi. xxvii.

(*c*) Selden de Successionibus, ch. 23.

(*d*) Taylor's Elements of Civil Law, 539.

(*e*) In the common pleas, in Hilary Term, 1659. Roll 773.

CLEMENT *against* SCUDAMORE.

as found is so far from excluding the daughter, that it expressly comprehends her; for the custom is, that the land is of the nature of *borough-English*, and did and ought to descend to the youngest son and his heirs. So that it is not only that it ought to descend to the youngest son, but also to him and his heirs: though it had
* [122] been* the same thing to me; for if the father be disseised, or make a feoffment during infancy, this right of entry shall descend to the youngest son, and if he die before entry, it shall descend to his daughter, though the father died not seised of the land (*a*). If there be descent of land in *borough-English* on an heir under age, and a real action is brought, he shall have *his age*, or the *parol shall demur*, as it would in cases of inheritance at common law. And what reason can there be why it should have those qualities, and not the other qualities as representative right? And he approved of the opinions of BERKLEY and BRAMPSTONE, *Justices*, in the case of *Reeves v. Mallster* (*b*); for he said, if the other opinion had prevailed it would beget abundance of confusion, but following the other would settle things upon a lasting foundation.

And judgment was given for the daughter (*c*).

(*a*) 8. Co. 43. Jones. 361.
(*b*) Cro. Car. 410.
(*c*) But a custom within a manor that lands shall descend to the *eldest sister*, where there is neither a son nor a daughter, does not extend to an *eldest niece*, but the lands must descend according to the rules of the common law, in default of such son, daughter, and niece. Den, on demise of Goodwin, *v.* Spray, 1. Term Rep. 466.

Case 165. Grovenor *against* Soame.

One joint and several bail-bond for the appearance of *three* defendants is bad.

S.C. 3. Salk. 57. S. C. Holt, 89. Cro. Jac. 286. 1. Salk. 97. 99.

ONE joint *bill of Middlesex* against three, with an *ac etiam super scriptum obligatorium* by them jointly and severally. The sheriff took one bail bond for the appearance of the three; and there being no appearance, the plaintiff took an assignment of the bond, and now would have the sheriff amerced.

FIRST, It was agreed, that the bail-bond was not according to the statute 23. *Hen.* 6. c. 9. being for a joint appearance to several actions.

An action will not lie against a sheriff for taking *insufficient bail*; but if he have not the defendant on the return he may be *amerced*, unless he has assigned the bail-bond. Ante, 47.—Cro. Eliz. 808. 852. 862. Noy, 39. 1. Sid. 96. 2. Saund. 59. 154. 1. Mod. 33. 240. 1. Salk. 97. 99. Tidd's Pract. 105. Sellon's Pract. 143. 1. Bac. Abr. 206.

HOLT, *Chief Justice*, said, that it had been adjudged in CHIEF JUSTICE GLYN's time, that if the sheriff take *insufficient bail*, and has not the party at the return of the writ, an action would lie against him; but that the contrary has been held since in the common pleas. It was indeed always agreed, that an action would not lie for taking *insufficient bail* (*a*); but it was not settled, whether it

(*a*) But see Ethericke *v.* Cooper, 1. Ld. Ray. 425.

would

would not lie for taking insufficient bail, and not having the party at the return of the writ; for though the statute commands him to take reasonable bail, yet if he has not the party he shall be amerced; and the statute 23. *Hen.* 6. c. 9. does not exempt him from that.

GROVENOR *against* SUAME.

The writ was, *in placito transgressionis ac etiam billæ*, and the bail-bond was to appear *in placito transgressionis* only, and held good in HALE's time.

Variance between *bail-bond* and *writ*.

And though ALL THE CLERKS said, that they knew the sheriff amerced after an assignment of the bail-bond, yet HOLT, *Chief Justice*, said, that he had known it denied.

Cro. Jac. 286. 2. Lev. 123. 2. Show. 51. 10. Mod. 327. 5. Com. Dig. "Pleader" (2. W. 25.). 1. Bac. Abr. 207.

By THE OTHER JUSTICES. If one accept of an assignment (*a*), and the same bail are given as bail to the action that were bail to the sheriff, he cannot deny them (*b*).

But by HOLT, *Chief Justice*, If the same that were bail become bail to the action, and he except against them, and they do not justify, he may go on with amerciaments against the sheriff.

If bail to *the sheriff* become *bail above*, they are not liable to *exceptions* after assignment of bail-bond.

1. Salk. 97. 7. Mod. 62. 117. Tidd's Practice, 135. 1 Com. Dig "Bail" (K. 5).

(*a*) See 4. & 5. *Ann.* c. 16. (*c*) See Boldero *v.* Gray, Cowp. 769.

Anonymous. Case 166.

BY ALL THE CLERKS. If *a release* be pleaded, and the plaintiff crave *oyer* of it, and the defendant will not grant it, the plaintiff may sign judgment for want of a plea.

Judgment may be signed after release pleaded and *oyer* denied.

Ante, 27, 28. Dyer, 227 Carth. 417. 453. Ld. Ray. 347. 892. 970. 1056. 1176. Salk. 497. 3. Lev. 50. Stra. 227. 1186. 1198. 1241. 1. Bac. Abr. 14.

* [123]

* Sir Samuel Astry's Case. Case 167.

SIR SAMUEL ASTRY being master of THE CROWN OFFICE, and having been absent from the exercise of his office a considerable time, being *fractus senio*, a *scire facias* was brought against him, and issue joined.

He now moved for a trial at bar.

The master of the crown-office, upon a *scire facias* against him and issue, is entitled to a *trial at bar*.

THE ATTORNEY GENERAL opposed it as a matter of *prerogative*, that THE QUEEN might try her causes *at nisi prius* or *at bar*, as she pleased.

S. C. Salk. 651. 2. Inst. 424. 1. Cro. 248. 2. Salk. 625. 651. 2. Keb. 133. 164. 2. Inst. 421. to 426. Ld. Ray. 1556. 8. Mod. 316. Fitzg. 40. Stra. 822. 1049.

CURIA. It is the common right of any gentleman at the bar to have a trial at bar, and it never has been denied in the case of an officer of the court. And though MR. ATTORNEY may have any of the queen's causes tried at bar, and is not bound to consent to *a nisi prius*, yet we are not satisfied that he ought to have *a nisi prius*

 where

SIR SAMUEL ASTRY'S CASE.

where trial at bar is reasonable, without consent; for the statute of *Westminster the Second*, *cap.* 30. which was the first statute of *nisi prius*, says, " that if matter require great examination it ought to " be at bar."

Et adjournatur: and nothing ever was done in it.

Case 168. Cuddon, Chamberlain of London, *against* Provost.

A bye-law creating a penalty for not weighing goods sold by foreigners at THE ANCIENT BEAM of the city of *London* is good. Post. 177.

1. Roll. Abr. 557. Cowp. 270. 1. Bac. Abr. 682.

A RETURN was, upon a *habeas corpus (a)*, that *London* is an ancient city, &c.; that time out of mind there was AN ANCIENT BEAM kept at the charge of the city for the weighing of all such goods as were usually bought or sold by weight in *London*, at which all foreigners ought, and time, &c. used to weigh all such goods, &c. and then sets forth their custom of making bye-laws for explanation of their custom, and that by a bye-law made at such a time, the same as in the *case of Barnardiston* (*b*), VIZ. that every foreigner who should sell goods usually sold by weight without having first weighed them at THE COMMON BEAM, should pay thirteen shillings and fourpence for every ——— weight; that defendant being foreigner, &c.

And all the exceptions taken in that case were insisted on here.

And yet THE COURT, after great consideration, awarded a *procedendo*, according to the said case.

(*a*) But it is settled, in the case of *Ballard v. Bennett*, that, except in *London*, the court of king's bench will not enter into the validity of a bye-law upon the return to a *habeas corpus*. 2. Burr. 777.

(*b*) 1. Lev. 14.—The exceptions in *Barnardiston's Case* were, 1st, That the bye-law for bringing all goods usually sold by weight to the city-beam was unreasonable. 2dly, That the bye-law was unreasonable in respect of the penalty and the inequality thereof. 3dly, That this bye-law takes from the subjects divers privileges that the law allows, as essoins, &c. 4thly, That the bye-law restrains the action to their own courts. 5thly, That it does not appear he had notice of the bye-law.

Case 169. Cudden *against* Estwick.

A bye-law of the city of *London* inflicting a penalty on any person who should employ a *porter* not a freeman of THE PORTERS COMPANY is void; but a bye-law that none but a *freeman* shall do porterage-work is good.—S. C. 1. Salk. 143. 192. S. C. Holt, 433. 8. Mod. 211. 267. 10. Mod. 131. 338. 12. Mod. 269. 686. Gilb. Eq. Rep. 43. Fitzg. 309. 313. 1. Peer. Wms. 183. 2. Peer. Wms. 207. Comy. Rep. 269. Stra. 462. 675. 1085. Viner's Abr. " Bye-Law" (A. 2.). pl. 28. 1. Bac. Abr. 339. 341. 2. Burr. 896. 3. Burr. 1847. Cowp. 270.

UPON a *habeas corpus* from *London* the return set forth the custom of *London*, that time out of mind there was an ancient COMPANY OF FREE PORTERS in *London*, and a custom to make bye-laws for the better governing of the said Company; and in pursuance thereof, an act of common council inflicting such a penalty on any that should employ any not free of the said Company in porterage work; and that the defendant did, &c.

So the doubt was, Whether such a bye-law, inflicting a penalty upon strangers for employing one not free, were good?

For

CUDDEN *against* ESTWICK.

For IT WAS AGREED, that a bye-law that none but a free porter ſhould do the work would be good, with a penalty. And in reference to bye-laws in general, a difference was taken between a private corporation or company and a great city * or borough; for the former can only make bye-laws to bind their own members, and touching matters that concern the regulation of the trade or other affairs of the Company; but great cities and towns, as *London*, *Briſtol*, *York*, *&c.* can make bye-laws for the better ordering and managing ſuch town, and that law will bind ſtrangers to the freedom of the town, while within ſuch towns, and they are bound to take notice of ſuch laws at their peril (*a*). *[124]

And this diverſity was agreed to by THE COURT.

HOLT, *Chief Juſtice*. It is true, every foreigner that comes to a place is bound to take notice of the law of the place (*a*); but here lies the hardſhip, that you lay a penalty upon a man if he do not take notice whether a porter is free or not free, and there is no way for him to know it.

And at laſt IT WAS ADJUDGED, that no *procedendo* ſhould go, and that the bye-law was void to bind a ſtranger, who could not have an action against them for not keeping a ſufficient number of porters, nor againſt the porters for not ſerving him. And an act of common council inflicting a penalty for buying from any but a freeman would be void.

CUSTOMS againſt *reaſon* are void.

NOTE, In the argument of this caſe it was ſaid, that cuſtom againſt reaſon is void, becauſe it deprives the ſubject of the common law, which is his birthright. And the reaſons by which a cuſtom is ſupported are generally theſe:

Moor, 588. Bridg. 11. Fitzg. 51. Ld. Ray. 57. 499. 869. 1135. Salk. 203. 1. Bac. Abr. 672 676. 1. Bl. Com. 77.

FIRST, Becauſe the party bound by it has ſome benefit by it.

SECONDLY, That the party who claims the advantage of it is at ſome charge by reaſon of it.

THIRDLY, That it may have a reaſonable commencement, or ſuppreſs fraud.

And the two firſt of theſe reaſons hold in the caſe of *toll-traverſe* and *toll-through* (*b*).

(*a*) A bye-law by the mayor and common council of *Exeter* that no butcher or other perſon ſhould, within the walls of the ſaid city, ſlaughter any beaſt, under pain of forfeiting certain penalties therein ſpecified, is good, being not in *reſtraint* of trade, but only *a regulation* of it; and other inhabitants are bound by it as well as the members of the corporation, Pierce *v.* Bartrum, Cowp. 170.—And if a power be granted by charter to a company exerciſing a particular trade in a particular place to make bye-laws for the government of all perſons exerciſing that trade in that place, the company is enabled to make bye-laws, binding as well on perſons exerciſing that trade who *are not members of the company* as thoſe who are. The Butchers Company *v.* Morey, 1. H. Bl. Rep. 370.

(*b*) See Year-Book 5. *Hen.* 6. pl. 26.; Prideaux *v.* Warren, 1. Mod. 105.; Harper *v.* Wells, 1. Mod. 48.; James *v.* Johnſton, 1. Mod 231. S. C. 2. Mod. 143. Coulſon *v.* Smith, Cowp. 47.; Lord Pelham *v.* Pickerſgill, 1. Term Rep. 660.

The

Case 170. The Queen *against* Langley.

It is not an indictable offence to speak *unmannerly words* of the mayor of a corporation, or the justice of a county; but the offender may be bound to *good behaviour*.

LANGLEY was indicted for these words spoke to the *Mayor of Salisbury*: "You, MR. MAYOR, I do not care a fart for you; "you, MR. MAYOR, are a rogue and a rascal."

It was urged, that the indictment lies; that the words tended to the disparagement of the government, whose officer this person was.

But to the contrary it was said,

* [125]

FIRST, That it was not laid that he was then in the duty of his office, or that he was a justice of peace.

S.C. 1. Salk. 190. S.C. 2. Salk. 697. S. C. 2. Ld. Ray. 1029. S. C. Holt, 654. 2. Salk. 425. 698. 2. Lev. 200. 1. Vent. 16 327. 2. Jo. 229. Faresl. 28. 1. Mod. 35. 2. Keb. 594. 3. Mod. 139. 1. Sid. 65. 144. Ld. Ray. 153. 11. Mod. 166. 10. Mod. 186. 12. Mod. 98. 414. 514. Stra. 400. 1157. 1. Hawk. P. C. ch. 21. s. 13. 4. Com. Dig. "Indictment" (E). 1. Sid. 65. Cro. Jac. 58. Hob. 62.

SECONDLY, As to the disparagement upon the government, a diversity was taken between elective officers, and such as are nominated by the queen; for the corruption of the first cannot reflect upon the government.

* THE COURT. He might have forced him to find sureties for his good behaviour, or committed him (*a*).

THEY ALSO AGREED, that whatever is a breach of the peace is indictable; as sending *a challenge*; but that these words were not a breach of the peace, but only occasional, and tending towards it.

And after great deliberation THEY ADJUDGED the words were not indictable: for it is not as much as said, that he was in the execution of his office, or a justice of peace. Indeed if they were put in writing, they would be *a libel* punishable either by indictment or action; but they are but loose unmannerly words, like those spoke of an *Alderman of Hull*, "When he puts on his gown, SATAN "enters into it," which were adjudged not indictable in *Kelynge*'s time (*b*). "You are a forsworn mayor, and have broke your "oath," not indictable (*c*). And binding him to his good behaviour is sufficient to secure the authority of mayors; but that must be done instantly, according to *Doctor Bonham's Case* (*c*).

HOLT, *Chief Justice*, said, that words that directly tend to breach of peace may be indictable; but otherwise, to encourage indictments for words would make them as uncertain as actions for words are.

(*a*) See the case of Rex *v.* Darby, 3. Mod. 139.; Simmons *v.* Sweete, Cro. Eliz. 78.; Dean's Case, Cro. Eliz. 689.

(*b*) 1. Mod. 35.

(*c*) Stiles, 251.

(*d*) 8. Co. 116. 118.

Berwick

Berwick *againſt* Andrews. Caſe 171.

Eaſter Term, 2. Anne, Roll 64.

ERROR OF A JUDGMENT upon *nil dicit* in the common pleas. The caſe was, An executor brought an action upon a judgment obtained by the teſtator, ſuggeſting a *devaſtavit* in the life-time of the teſtator.

If a plaintiff recover againſt an adminiſtrator, and die, his executor may maintain debt on the judgment upon a ſuggeſtion of a *devaſtavit* by the defendant in the life-time of the teſtator.

And it was objected, that this carried it a ſtep farther than the caſe of *Wheatley v. Lane (a)*; for there the action was brought by the party to the judgment, and to whom *the wrong* was done: whereas this is, FIRST, by one that is no party to the judgment; for if he would ſue execution upon this judgment, he muſt have firſt made himſelf party by a judgment on a *ſcire facias*, AND NEXT by one to whom the *tort* was not done; and this is a perſonal *tort* that ought to die *cum perſonâ*, and that this matter ought not to go a ſtep farther. Such action will not lie upon a bond ſuggeſting a *devaſtavit (b)*; and it being for a wrong done to the teſtator, an action ought not to lie for it for the executor no more than it would lie againſt an executor of an executor *de ſon tort* till the ſtatute of 30. *Car.* 2. c. 7.

S. C. 1. Salk. 314.
S. C. Holt, 314.
S. C. 2. Ld. Ray. 971. 1502.
1. Sid. 397.
1. Lev. 231. 255.
2. Lev. 110.
10. Mod. 95.
12. Mod. 71.
Fitzg. 265.
Ld. Ray. 36.
1. Peer. Wms. 687.
Cowp. 375.
4. Term Rep. 280.

MOUNTAGUE, *contra*, relied upon the reaſon of the caſe of *Wheatley v. Lane*, and that of *Cluther v. Thin (c)*.

HOLT, *Chief Juſtice*. The defendant is the party againſt whom the recovery is, and judgment is *de bonis teſtatoris* againſt him; and it is ſuggeſted, that he has *waſted*: this is what the plaintiff's teſtator might have done. Sure if an eſcape were in the life-time of * the teſtator, the executor may have debt againſt the jailor for it; but ſuch action would not lie againſt an executor, nor would this action lie againſt the defendant's executor here, as was adjudged in this court in HALE's time, becauſe it is a *perſonal tort*, which dies with the perſon. And it was compared to the caſe of an eſcape by the ſheriff, for which debt does not lie againſt his executor, though it does againſt himſelf. But in caſe of eſcape the action always lies for the executor, even where it is in his teſtator's time; and ſhall not the executor of a parſon have debt againſt a pariſhioner for not ſetting out tithe (*d*). The cauſe why he ſhall have debt is, becauſe it is an injury done to his right, and therefore within the equity of the ſtatute *De bonis aſportatis*; and a *quare impedit* lies for an executor upon that ſtatute, in caſe he bring it within ſix months after the avoidance; and upon this judgment he might have ſued a *ſcire facias*, and after judgment therein have a *fieri facias* ſuggeſting a *devaſtavit*. Now this action is in lieu of a *ſcire facias*.

*[126]
Lutw. 66. 418.
N. Lutw. 26. 124. 181. 208.
2. Lev. 110.
1. Vent. 30.
Lutw. 670.
1. Salk. 310. 314.

POWELL, *Juſtice*. HALE uſed to ſay, that this action ought not to be ſuffered but when there was a judgment to ſupport it; and this

(*a*) 1. Saund. 219.
(*b*) 1. Vent. 313. 2. Lev. 145. 209. 3. Keb. 735. 797.
(*c*) 2. Sid. 102. N. Lut. 208. 210.
(*d*) 1. Sid. 407.

BERWICK *against* ANDREWS.

is within the equity of the statute *de bonis asportatis*, 4. *Edw.* 3. c. 7.

GOULD and POWYS, *Justices*, accordingly. The difference is, where it is a *tort* annexed to goods then it is within the statute, because it arises *ex delicto*, mixed with a right (*a*).

And POWELL, *Justice*, said, that the better opinion was, that an action on the case would not lie for an executor for the *false return* of a process of execution.

HOLT, *Chief Justice*. I have known the contrary adjudged.

A declaration, in debt by an executor on a judgment obtained by his testator against an administrator, suggesting a *devastavit* is good, although it do not aver that *the debt was not satisfied*.

Dougl. 5. 732.

But then AN EXCEPTION was taken to *the declaration*, that it was not alledged that the debt was not satisfied, but only that the testator nor plaintiff could not have execution of the judgment; but it may be they were satisfied without execution.

HOLT, *Chief Justice*. The foundation of this action stands upon two things, *viz.* the debt not being satisfied, and *the waste*; and in all actions of debt it is incumbent upon the plaintiff to shew that the debt is due.

POWELL, *Justice*. If the plaintiff had been paid the wasting, the *assets* could be no *devastavit* as to him: and if issue were taken upon *devastavit* or not, the defendant might give payment to the plaintiff in evidence.

[127] * *Quod* HOLT, *Chief Justice*, *negavit*; because the wasting the *assets*, the debt being not satisfied, is the cause of action; and if the debt be paid, the issue ought to come upon that, that is a *nihil debet*, which may well be pleaded, though this be a debt upon a judgment, because this is matter of fact; and if you traverse the *devastavit*, you admit the non-payment: and he compared it to the case of debt against a sheriff for an escape, in which you must shew the debt not to be satisfied. Suppose a defendant in execution pays the plaintiff, and no satisfaction is entered on record, and the sheriff suffers him to escape, and debt is brought against him for it, he cannot take advantage of that payment.

1. Saund. 38. 219.

And at last, the record of the case of *Wheatley v. Lane* (*b*) was brought into court, agreeing exactly with this declaration.

And the plaintiff had judgment,

(*a*) Where the cause of action is money due, or a contract to be performed, or gain or acquisition by the labour or property of another, or a promise by the testator or intestate expressed or implied, the action survives against his personal representative; but if it be *a tort*, or arise *ex delicto* supposed to be by force against the peace, or where the plea to the action must be that the testator or intestate was *not guilty*, the right of action dies with the person. Hambly *v.* Trott, Cowp. 371. 375.

(*b*) 1. Saund. 216. S. C. 1. Lev. 231. 255. S. C. 1. Sid. 397. S. C. 2. Keb. 431. 443. 455.

Russell

Russell *against* Corn. Case 172.

An action of *false imprisonment* of the wife, brought by *husband* and *wife*, declaring *per quod* the husband's domestic concerns remained undone, *ad damnum* of both, is good, and the *per quod* only for aggravation.

FALSE IMPRISONMENT by husband and wife, for the imprisonment of wife, *per quod negotia domestica* of the husband *per spatium* ——— *remanserunt infecta* ; *ad grave damnum* of both.

IT WAS MOVED *in arrest of judgment*, that the business of the husband remaining undone could not be to the damage of the wife, and that the action for that ought to be by the husband alone ; as if the husband conclude *per quod solamen et consortium amisit*, he must conclude *ad damnum* of him alone.

But it was answered, that here the action being well brought and conceived for the imprisonment, what came under the *per quod* would only be taken for aggravation ; as if words, in themselves actionable, be spoke of a wife, and the husband and wife bring the action, and conclude *per quod* the husband lost his customers, it will be well (*a*) ; for the words being in themselves actionable, the *per quod* shall be taken for aggravation.

S. C. 1. Salk. 119. S. C. Holt, 699. S. C. 2. Ld. Ray. 1031. Post. 149.

Quæ omnia Cur. concessit.

And by HOLT, *Chief Justice*, matter may be laid by way of *aggravation* in trespass for breaking his house and beating his servant, without saying *per quod servitium amisit* (*b*). No action lies for the master for battery of his servant without a *per quod*, yet it may be well put in as an aggravation ; but if you make two several counts of it, one of them, *viz.* for beating servant, will be bad. Suppose a man get another's maid or daughter with child, no trespass lies for it ; but if he that has done it came into the house without the owner's leave, he may put the getting his daughter with child in for aggravation, or he may omit it, and give it in evidence within the *alia enormia*.

Cro. Jac. 123. 1. Keb. 787. 1. Salk. 119. 2. Salk. 642. 1. Show. 180. Andr. 245. 1. Bac. Abr. 306, 307. 4. Term Rep. 616. 1. H. Bl. Rep. 108.

Judgment was given for the plaintiff, *nisi causa*, the first day of next Term (*c*).

(*a*) See Coleman and his Wife *v.* Harcourt, 1. Lev. 140. and Grove and his Wife *v.* Hatt, Bull. N. P. 7.

(*b*) See Chamberlain *v.* Greenfield, 3. Wils. 297.

(*c*) See Newman *v.* Smith, in the king's bench, in Easter Term, 5. *Anne*, 2. Salk. 642. S. C. Holt, 699. Note 12mo edition.—See also Milner *v.* Milnes, 3. Term Rep. 627.

EASTER

EASTER TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir John Powell, *Knt.* }
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.* }
Edward Northey, *Esq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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*[128]

* The Queen *against* Lane.

Case 173.

INDICTMENT was for exercising the trade of *a barber* without service of seven years.

An indictment on 5. *Eliz.* c. 4. must be laid *contra pacem.*

The exception was, that it was not laid *contra pacem.*

And though HOLT, *Chief Justice*, thought it well enough, because laid *contra formam statuti*, yet by THE OTHER THREE it was quashed, for every breach of a law is against the peace, and ought to be so laid.

S.C. 3. Salk. 190. 1. Salk. 67. Post. 220. Cro. Jac. 527. Cro. Car. 584. 2. Salk. 613.

4. Mod. 145. 164. 5. Mod. 425. 2. Hale, 188. 2. Hawk. P. C. ch. 25. f. 92. 4. Com. Dig. "Indictment" (G. 6.). Fitz. 63. Strange, 834.

Smith *against* Aiery.

Case 174.

IN an action on the case for money won at play, there were two counts, one setting forth *a special agreement* to play at such a game, and mutual promises of payment, as it ought to be; the other was, that in consideration that the plaintiff such a sum had won of the defendant at play, he promised to pay it.

An *indebitatus assumpsit* will not lie to recover money won at play.

S. C. 3. Salk. 14. 175. S. C. Holt. 329. S. C. 2. Ld. Ray. 1034. Post. 131. 1. Salk. 22. 344. 5. Mod. 13. 1. Lutw. 180. 1. Vent. 53. 152. Hard. 486. 1. Lev. 298. 3. Lev. 118. Ld. Ray. 68. Dougl. 18. 2. Bac. Abr. 15.

And

SMITH against AIRRY.

And here IT WAS RESOLVED, on a motion in arrest of judgment after a verdict for the plaintiff and *entire damages* given,

FIRST, That an *indebitatus assumpsit* did not lie for money won at play; for that action never would lie but where *debt* would lie (*a*), and it never was heard that debt was brought for money won at play.

* [129]

If a declaration contain two counts; the first on *mutual promises* for money won at play; the second on an *indebitatus assumpsit* to pay "the said sum "won at the "play aforesaid;" the latter count is bad. Dougl. 377. 651. 730.

SECONDLY, That the second count was bad, for at that rate one may declare, that defendant was indebted to him, upon a certain agreement, in such a sum of money, and that in consideration thereof he promised to pay, which would doubtless be bad; for he should specially set out some agreement whereby a debt was raised, as for * goods sold and delivered, &c. An *indebitatus* can never be upon *mutual promises*; but *general assumpsits* lie on mutual promises (*b*).

HOLT, *Chief Justice*, quoted a case in my LORD HALE's time, where it was held, that it would not lie upon *a bill of exchange* against the acceptor (*c*). And he said, that there was no way in the world to recover money won at play but by *special assumpsit*.

PER CURIAM. Notwithstanding the case of *Eccleston v. Linne* (*d*) in the exchequer chamber, it has been held frequently, both here and in common pleas, ever since, that this action of *indebitatus* would not lie for money won at play (*e*).

If some of the counts in a declaration are bad, and entire damages given, the error is not cured by the verdict. Dougl. 377. 730.

THIRDLY, They held clearly, that any thing in the first count which was right, could not help any defect in the second; for though they both were put in one declaration, yet they were as distinct as if they had been in two several actions.

A verdict cures the defect of a *special agreement* not being alledged. 8. Mod. 240. 10. Mod. 229. 300. 12. Mod. 306. 421. 510. Comy. 12. Stra. 973. 1011.

FOURTHLY, Though it was objected, that this was *after verdict*, whereby the jury had found that plaintiff had won money of defendant, which could not have been without *a special agreement* and *mutual promises* between them; and if what the jury must necessarily have found had been alledged, it would have been well, and therefore the verdict cured (*f*);

Yet THE WHOLE COURT ordered judgment to be stayed till the plaintiff moved further.

And PARKER moved for judgment at another day, alledging, that *mutual hazard* sufficed to raise *a debt*; and for cases cured

(*a*) By LORD MANSFIELD, There is no foundation for the notion that no *assumpsit* will lie where an action of debt may not be brought. 3. Burr. 1008.

(*b*) Carth. 479. Skin. 196. 218.

(*c*) Hard. 485. 1. Vent. 152. 1. Bac. Abr. 164.

(*d*)

(*e*) See Browning v. Morris, Cowp. 790

(*f*) A verdict will not aid where the *gist* of the action is not laid in the declaration, but it will cure ambiguity, Avery v. Hoole, Cowp. 806. and therefore, after verdict, nothing is to be presumed, but what is either expressly stated in the declaration, or necessarily implied from those facts which are stated. Spires v. Parker, Douglas, 682. *notis*.

after

after verdict, quoted the cases of *Mannington v. Williams (a)*, and *Ashford v. Crispin (b)*. SMITH *against* AIRY.

HOLT, *Chief Justice*. The action ought to be brought upon *the agreement* of the parties. It is true, that when two agree to play for so much money, it is an actual promise; but if either win, there is no debt arises thereupon, for nothing but a meritorious valuable consideration can raise a debt, and it is an error to think that every contract which obliges one to pay money raises a debt *(c)*: as if *A.* promise *C.* to pay him a debt due to *C.* from *B.* and it be for good consideration, *A.* is thereby bound to pay it, but yet it is not a debt upon him. And if he after had come, and in consideration that I am bound to pay you the debt of *B.* I promise to pay you, an *indebitatus* would not lie thereupon. An *indebitatus* has been brought for a tenant-right fine *(d)*, which I never could digest.

How the account ought to have been.

1. Vent. 951. Hob. 18. 88. 7. Mod. 12. 11. Mod. 147. 10. Mod. 295. 12. Mod. 69. 258. 295. 324. Ld. Ray. 562.

GOULD, *Justice*, quoted the very case of *Shereborn v. Colebatch (e)*, and the case of *Methwin v. Andrews (f)* in the court of common pleas.

PER TOTAM CURIAM, judgment was arrested.

(a) 1. Vent. 109.
(b) 1. Vent. 123.
(c) See Moses v. Macfarlan, 2. Burr. 1007. Clerk v. Shee, Cowp. 197. 294.
(d) 3. Lev. 261. See also Grant v. Astle, Dougl. 728. *notis.*; Whitbread v. Hurst, Dougl. 727. *notis.*
(e) 2. Vent. 175.
(f)

*[130]

* Anonymous.

Case 175.

IN EJECTMENT, the term was made for five years; and after verdict for the plaintiff, he was delayed of judgment and execution, by *injunction* in chancery, until the term incurred.

In ejectment, *the term* shall not be enlarged without consent, although the plaintiff was prevented by an injunction from proceeding.

And now it was moved to renew the term, and the case of *Dangdell v. Greenvill (a)* was quoted, where it was done, and that they used to do it frequently in THE EXCHEQUER.

CURIA. We cannot do it without altering the record.

GOULD, *Justice*, said, that they had held in *Sir John Roll's Case (b)*, that it could be done by consent, but not otherwise *(c)*.

HOLT, *Chief Justice*, said, he considered there wanted a clock-house over-against the hall-gate.

And the motion was denied *(d)*.

Post. 222. 288. 309. 1. Salk. 322. Carth. 3. 204. 288. 391. &c. Runn. Eject. 104. 12. Mod. 125. 398. 656. Ld. Ray. 561. 1411. Stra. 807. 1211. 1272. 3. Peer. Wms. 36.

(a) 1. Lev. 308.
(b) 1. Vent. 122. 2. Keb. 757.
(c) See 1. Salk. 257. and Oats v. Shepherd, 2. Stra. 1272.
(d) See Stra. 1211. 1272. 2. Ld. Ray. 896. 5. Mod. 33. 354. 1. Mod. 252. Barnes, 4to. 186. 4. Burr. 2449. Lee v. Ellis, 2. Bl. Rep. 941.

Parkins,

Case 176. **Parkins *against* Woollaston.**

If execution be sued out before a *writ of error* is allowed or notice given, there shall be no *restitution*.

CAPIAS on a judgment returnable such a day, and *non est inventus* returned, but not filed. A writ of error was taken out before the day of return of the *capias*, but not allowed till that very day, nor any notice thereof to the plaintiff's attorney.

S. C. post. 139. S.C. 1. Salk. 321. Post. 139. 1. Vent. 30. *cont.* 1. Sid. 44, 45. 2. Stra. 867. 1186. 1. Wilf. 16. 5 Com. Dig. "Pleader" (3. B. 12.). Comy. 321. 556. 564. Stra. 526. 632. 867. 1186. Ld. Ray. 47. 405.

THE COURT said, that the opinion in some books was, that a *writ of error* was a *supersedeas* to avoid execution from the ensealing thereof, though not to punish the officer until *supersedeas* comes to him; and of this opinion is *Rolle*; but that the law now is taken, that it is not a *supersedeas* until notice to the plaintiff's attorney, and that the allowance thereof is sufficient notice, or that actual notice be before allowance (*a*).

A writ may be well executed on the day of its return, although it be after the rising of the Court.

Cro. Eliz. 761.

AND THEY HELD, that if the *writ* be executed before notice of *writ of error*, the return or perfection thereof may be after: and if a *capias* be returnable such a day, an execution of it *sedente Curiâ* that day is good, *secus* not (*b*); so that they were all clear, that if a writ were returnable as of yesterday, but not actually returned, and a writ of error is allowed or notified to-day, yet the return may be made and filed to-day.

Where writ of error is allowed the same day the execution is returnable, &c.

12. Mod. 501 1. Term Rep. 279.

And if a writ of error be allowed or notified *sedente Curiâ*, the day on which the writ of execution is returnable (because it comes *sedente Curiâ*, while the writ of execution is executable, and there cannot be well a fraction of a day), there it ought not to be returned or filed, but is *superseded*: but if it is not notified until after the Court is up, at which time the execution is executable, there a return may be of the writ, and that may be filed.

And according to that diversity it was ordered to be filed here. PER CURIAM.

NOTE, It was upon a *scire facias* against bail, and no *capias* against principal pleaded.

(*a*) The *allowance* of a writ of error is of itself a *supersedeas*, and the service of it is only to bring the party into contempt, Jaques *v.* Nixon, 1. Term Rep. 279.; and where a *capias ad satisfaciendum* is returnable against the principal on a particular day, before which a writ of error is allowed and served, that operates as a *supersedeas* against the bail, although the *ca. sa.* has been four days in the office before the allowance of the writ of error, Parry *v* Campbell, 3. Term Rep. 390.

(*b*) But it seems to be now settled, that a writ may be well executed on the day of its return, although the execution was subsequent to the rising of the Court, Maud *v.* Bernard, 2. Burr. Rep. 813. But in *scire facias* against bail, if they were summoned on the return day only an hour before *the Court rises*, the Court will set aside the proceedings, Webb *v.* Harvey, 2. Term Rep. 757.

Anonymous.

* Anonymous. Case 177.

BY HOLT, *Chief Justice*, and THE COURT. In an action by an assignee of bankrupt by commissioners on a simple contract, the right way is to lay the promise to have been to the bankrupt; except there be an express promise after assignment made to the assignee.

A declaration in *assumpsit* by an *assignee* ought to state the promise as made to *the bankrupt*, unless an *express promise* is made to *the assignee*. 3. Salk. 59. Cowp. 570. 3. Term Rep. 433. 779. Cooke's B. L. 615.

And the way of declaring on a promise to the assignee is very inconvenient, and a means to oust the defendant of the benefit of the *statute of Limitation*; for if the goods were sold five years before the assignment by the bankrupt, and then the debt is assigned, and a year passes, and the assignee declares on a promise to himself, it will not be a good plea to say, that the defendant "*non assumpsit infra sex annos* to the bankrupt," for that does not answer the declaration. And if he plead "*non assumpsit infra sex annos* to the plaintiff," it will be against him; for if there be any promise transferred by the act, it is only upon the assignment; and the intent of the statute was only to transfer the action, and nothing else.

An assignee ought not to declare on a promise to *himself*. 2. Show. 238. 1. Keb. 1. 289. 1. Lev. 17. Farest. 83. 96. 3. Lev. 69. 191. Carth. 149. Skin. 21. 30. 149. 270. 293. 8. Mod. 171. 10. Mod. 244. 12. Mod. 324. Ld. Ray. 741. 1548. Stra. 697.

Indeed, if after assignment (*a*) another receive the money, action will lie for the assignee upon a promise to himself, because the receipt of money after assignment is a contract with him, and every contract or agreement, *per* HOLT, *Chief Justice*, is an *express promise*, not in word, but in deed, which is as strong; and there is no such thing as a *promise in law* (*b*), and that acceptance of a bill of exchange is an express promise to pay it.

An assignee may declare in his own name for money had and received subsequent to the assignment. 2. Saund. 239. 1. Vent. 10. Ante, 29, 30. 81. 129. 3. Lev. 191. 1. Mod. 324. 2. Black. Rep. 830. Cooke's B. L. 617.

(*a*) 2. Saund. 239. 1. Vent. 10. Ld. Ray. 365

(*b*) See 1. Sid. 306. 1 Bac. Abr. 177. Comy. Rep. 205.

Mrs. Dennis *against* Doctor Lane. Case 178.

MRS. DENNIS was a widow, and had a daughter who was *an heiress* to eight hundred pounds a-year, to whom *the Doctor* made love: the mother thereupon forbad him her house; yet he came at another day, and meeting the mother upon the stairs, notwithstanding she then again expressly forbad him to go forward, he pushed on to the young woman's chamber in a rude

If a gentleman visit a young lady as her lover, and, on her parents denying him access, he intrudes himself rudely into the house, follows the young lady on a journey taken to avoid him, assaults the person under whose protection she is placed, and threatens to force her from him, it is a good cause to demand *surety for his good behaviour* from him. And although *the surety* must be demanded recently after *the cause* happen, and while *the fear* it occasions exists, yet if the party, at any distance of time afterwards, do any act, though to another person, which shews that *the old grudge* remains, the Court will couple the last act with the antecedent cause of fear, and, on articles exhibited, grant *surety of the peace*. 1. Hawk. P. C. c. 60.

manner.

Mrs. Dennis against Dr. Lane. manner. This behaviour frightened the daughter's mother so much, that she sent for friends to conduct her daughter to *London*; of which *the Doctor* having intelligence, came with three others, and followed the daughter, and came to the same inn where they lodged at night; and took up the adjoining rooms to the mother and daughter, whereby they put the mother into fits for fear; and the next morning, as they were taking coach, *the Doctor* assaulted *the gentleman* that put the lady into her coach, and pursued them again that day, and gave out that he would force the daughter from them, so that the mother was fain to hire men to guard the inn that night.

This matter was transacted in *March* was twelve-months.

The Doctor, at the last assizes at *Hereford*, meeting *the gentleman* who was the principal manager of the family, and helped to guard the daughter to *London*, he being a barrister at law, and a near relation to the young lady, in his gown, assaulted him, and beat him severely with a cane; whereupon the Judge of assize bound him to appear the first day of this Term in this court.

* [132] And upon all this matter being put together, and an oath by her, * that she believed the assault upon her kinsman to be in pursuance of the design upon her daughter; and that she was informed he threatened her, and endeavoured to corrupt her daughter's maid, to facilitate his stealing the daughter;

Per Curiam, The doctor's coming in that manner, in despight of the mother's prohibition, and against her will, was good cause to require the *security of the peace*; and so was the ensuing behaviour of *the Doctor* upon the road.

Secondly, This demand of the *security of the peace* ought to be fresh after the fray or cause of fear given, and therefore if it had not been for the new assault upon the kinsman, the Court would not bind him to the peace here; for the suffering considerable time to pass before the demand of security, is a great sign that the party was not afraid.

12. Mod. 565. Fitzg. 268. 2. Peer Wms. 202. But here there being an old offence, which one ought to give security of peace for, and a fresh occasion given, which gives probable reason to believe the old grudge continued,

3. Peer. Wms. 203. The Court ordered him to give security to keep the peace, and took his own recognizance in two hundred pounds, and that of two more in one hundred pounds each, but refused to bind him to his good behaviour, because of the length of time; though they declared, that if they had come when the matter was fresh, they would have bound him to his *good behaviour*, and in a much greater sum.

The causes for demanding *surety of the peace* must appear in the Articles. Note, All the causes of binding to the peace ought to appear in the articles which are sworn by the party, and read in presence of the other.

And

And one that gives security of peace must stand upon his recognizance for a year and a day.

Recognizance to keep the peace must be for a year and a day.

And the condition of a recognizance to keep the peace is to keep peace towards all the king's subjects, and particularly towards the person that demands it (*a*).

Recognizance to keep the peace to *all persons*.

(*a*) A recognizance to *A. B.* for a year or for life, or without expressing any certain time (in which case it shall be intended to be for life), or without fixing any time or place for the party's appearance; or without binding him to keep the peace against all the king's people in general, it is said, is good. 1. Hawk. P. C. ch. 60. s. 15. The Court are not confined to time, but may require bail for such a period as they shall think necessary for the preservation of the peace, Rex *v.* Bowes; 1. Term Rep. 696.

Shuttle *against* Wood. Case 179.

DEBT upon *a recognizance* given in common-pleas brought in this court.

DEBT lies in the *king's bench* on a recognizance of bail taken in the *common-pleas*, but it shall be discharged if the principal be surrendered in *eight days* in full Term, after return of process.

RAYMOND moved to have the action discharged, for that the defendants had surrendered the *principal*, even before the action commenced; and now by A RULE OF COURT (*a*) here, if debt be brought upon a recognizance of this court, the defendant has *eight days* in full Term to render the principal, whereby defendants have now equal advantage in the case of debt and *scire facias* upon a recognizance.

DEE answered, that though that be a rule in this court, yet there is no such rule in the common-pleas; and this being upon a recognizance of the common-pleas, we must do in it as would be done there if the action were brought there.

S. C. ante, 42. S. C. 1. Salk. 564. 659. S. C. Holt, 612. Post. 159. Hob. 195. Aleyn, 12. 1 Cro. 312. 1. Roll. Abr. 60. 1. Salk. 101. 2. Salk. 564. 600. 1. Barnes, 50. 76. 6 Mod. 340. 11. Mod. 253. 12. Mod. 652. 1. Ld. Ray. 720. 156. Tidd's Practice, 146. Sell. Pract. 178. 1. Com. Dig. 697. 1. Wils. 316. 3. Com. Dig. "Debt" (A, 2.)

THE WHOLE COURT said, that he should have the same sauce here as in the common-pleas. Formerly they would not suffer an action upon *a recognizance* in this court, because of the greater * mischief it would be to a defendant than a *scire facias*; but surely the action was always well maintainable; and our rule is in avoidance of that mischief.

RAYMOND was directed to enquire how the course of common-pleas was, for they must guide themselves thereby here in this case. [133]

PER CURIAM. Anciently there could be no proceedings on a bail-bond until the next Term, and it is a great grievance to put it in suit until after a convenient time; though it is otherwise practised in the common-pleas by the attornies, merely to make work for themselves.

(*a*) Rule Trinity Term, 1. *Queen Anne*, 1. Salk. 102.

Case 180. **Anonymous.**

A devisee is to be favoured as much as an *heir at law*. 2. Bl. Com. 13.

PER CURIAM. A *will*, when clear, and the intent of the parties fully appears, is as much to be favoured as any *heir at law* (*a*).

(*a*) But if the intention of a testator be ever so apparent, the *heir at law* will inherit unless the estate is compleatly disposed of to somebody else. Den *v.* Caskin, Cowp. 661.

Case 181. **Southers's Case.**

THE MARSHAL is bound to take notice of commitments in court. Post 183. 1. Salk. 272.

SOUTHERS, *marshal*, was complained against by WHITACRE, for that he wilfully suffered a person brought up upon a *habeas corpus*, and committed in court, to escape.

The marshal, without more ado, is obliged to take notice of all commitments in court.

There shall be but one *habeas corpus*, though in custody upon a *criminal* and *civil* matter.

PER CURIAM. If one be in custody upon a criminal and also upon a civil matter, and he would move himself up by *habeas corpus*, there ought to be but one *habeas corpus* either on *the crown-side* or on *the plea side*, and both causes ought to be returned. Tidd's Pract. 171.

Case 182. **The Queen *against* The Town of Clitheroe.**

The old bailiffs of a town are obliged to return a *mandamus*. Ante, 25. Inst. Leg. 159. 2. Salk. 431. 699. 701. 12. Mod. 126. 251. 322. Ld. Ray. 848. 885. Stra. 640. 808. 895.

A MANDAMUS was to the bailiffs of the town of *Clitheroe*, to swear in such and such persons into the office of bailiffs.

BROTHERICK moved, that they should not be obliged to make a return, for they could not well do it, because the writ was not directed to them in their natural capacities, and by their names, and two other persons were bailiffs, so that it would be hard to put them to make a return.

But PER CURIAM, If you, when bailiffs, have sworn in others who were not rightly chosen, you notwithstanding continue bailiffs still, and therefore ought, as such, to make a return to the queen's writ. And they were ordered to make a return.

A *mandamus* may be amended before the return.

And here HOLT, *Chief Justice*, said, They might amend the writ at any time before it was returnable; but that they on the other side could not, except to quash it until a return thereto was made and filed (*b*).

(*b*) The Court will not amend a *mandamus* after a return has been made to it, Rex *v.* The Mayor of Stafford, 4. Term Rep. 689.

Adams

Adams *against* the Terre-tenants of Savage. Case 18[illegible]

The record of *nisi prius* in a *scire facias* by an administrator against the terre-tenants. Salk. 40. Mod. Cas. 194.

Dorset, *to wit.* } THE lord the king hath sent to the sheriff of the county of *Dorset* his writ close in these words, to wit, *William the Third*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland* king, defender of the faith, &c. to the sheriff of *Dorset*, greeting: Whereas *Sarah Adams*, widow, lately in the court of the lord *Charles the Second*, late king of *England*, before the late king himself at *Westminster*, to wit, in Easter Term, in the thirty-fourth year of the reign of the same late king, by bill, without the writ of the said late king, and by the judgment of the same court, hath recovered against *George Savage*, *Knight*, otherwise called *George Savage of Blaxworth* in the county of *Dorset*, *Esq.* as well a certain debt of two hundred pounds as forty shillings for her damages which she hath sustained as well by reason of the detention of that debt, as for her costs and charges by her about her suit in that behalf expended, whereof he is convicted, as by the record and proceedings thereof in our court before us now remaining manifestly appears: nevertheless execution of the judgment aforesaid yet remains to be executed, and as well the said *George* as the said *Sarah* are dead, as by the suggestion of *John Adams*, the administrator of the goods and chattels, rights and credits, which belonged to the said *Sarah Adams* at the time of her death, we have in our court before us lately understood; and because we are willing that those things which in the said court of the said late king were lawfully transacted should be carried into due execution, we command you, that by good and lawful men of your bailiwick you give notice to the tenants of all the lands and tenements in your bailiwick of which the said *George Savage* was seised in fee-simple on *Saturday* next after three weeks of *Easter*, in the thirty-fourth year of the reign of the said lord *Charles the Second*, late king of *England*, &c. abovesaid, on which day the judgment aforesaid was given, or ever after, that they be before us at *Westminster* on *Friday* next after the octave of *Saint Martin*, to shew if they have or can say any thing for themselves, why the debt and damages aforesaid ought not to be levied on those lands and tenements, and paid to the said *John*, according to the force, form, and effect of the recovery aforesaid, if they shall think fit, and farther to do and receive what our said court before us concerning them shall then and there consider in this behalf; and have there then the names of those by whom you shall give them notice, and this writ. Witness *J. Holt*, *Knt.* at *Westminster*, the twenty-third day of *October*, in the thirteenth year of our reign.

Holt, Coleman.

Death of the plaintiff in the judgment.

On which day, before the lord the king at *Westminster* comes the said *John Adams*, the natural son of the said *Sarah Adams*, by *William Underwood*, his attorney, and says, that after the judg-

 ment

ADAMS against THE TERRE-TENANTS OF SAVAGE.

ment aforesaid in form aforesaid given, to wit, on the tenth day of *May*, in the twelfth year of the reign of the lord the now king, at *Blaxworth* aforesaid in the county aforesaid, the said *Sarah Adams* died intestate, being not paid the debt and damages aforesaid; after the death of which said *Sarah*, administration of all and singular the goods and chattels, rights and credits, which belonged to the said *Sarah* at the time of her death by *Charles Sloper*, clerk, master of arts, official principal of the reverend *Robert Cooper*, clerk, master of arts, archdean of the archdeanery of *Dorset* lawfully constituted, to whom the commission of that administration of right belonged, on the twenty-first day of *July*, in the thirteenth year of the reign of the now king, at *Blaxworth* aforesaid in the county aforesaid, to the same *John* in due form of law was committed. And the sheriff of the county of *Dorset*, to wit, *W. Fitch*, *Esq.* now returns, that he the said *W. Fitch*, by virtue of the writ aforesaid to him directed by *A. S.* and *W. M.* good and lawful men of his bailiwick, hath given notice to *D. Sadler* and *Philippa* his wife, tenants of the capital mansion-house with the appurtenants called *Blaxworth House*, and of the manor of *Blaxworth* in his county; to *Philip Strickland*, tenant of a farm, messuage, or tenement, called the *Higher Farm*, and of one hundred and ninety-three acres of land, wood, meadow, and pasture, more or less, thereto belonging, situate, lying, and being within the parish of *Blaxworth* aforesaid; and also tenant of one other farm, messuage, or tenement, called the *Middle Farm*, and of two hundred and eighty acres of land, wood, meadow, and pasture, more or less, thereto belonging, situate, lying, and being within the parish aforesaid; and likewise tenant of one other farm, messuage, or tenement, called the *Lower Farm*, and eighty-six acres of land, wood, meadow, and pasture, more or less, thereto belonging, situate, lying, and being within the parish aforesaid, late in the tenure or occupation of *H. Trenchard*; to *Jehonadab Savage*, tenant of one messuage or tenement, and eighty acres of land, meadow and pasture, with the appurtenances thereto belonging and appertaining; to *W. Savage*, tenant of one messuage or tenement, and sixteen acres of land, meadow and pasture, with the appurtenances thereto belonging; to *P. Hayward*, tenant of three other messuages or tenements, and eighty acres of land, meadow and pasture, with the appurtenances thereto belonging; to *J. Dewey*, tenant of another messuage or tenement, and thirty acres of land, meadow and pasture, with the appurtenances thereto belonging; to *S. Hadderley*, tenant of one other messuage or tenement, and seven acres of land, meadow and pasture, with the appurtenances thereto belonging; to *J. Jefferies*, tenant of one other messuage or tenement, and forty acres of land, meadow and pasture, with the appurtenances thereto belonging; to *M. Alner*, widow, tenant of one other messuage or tenement, and forty acres of land, meadow and pasture, with the appurtenances thereto belonging; to *T. Laming*, tenant of one other messuage or tenement, and thirty acres of land, meadow and pasture, with the appurtenances thereto

Administration granted.

It should have been granted by the metropolitan.

The return.

thereto belonging and appertaining; to *N. Fry*, tenant of one other messuage or tenement, and twenty acres of land, meadow and pasture, with the appurtenances thereto belonging; to *W. Durham*, tenant of one other messuage or tenement, and twelve acres of land, meadow and pasture, thereto belonging; to *T. Durrant*, tenant of one other messuage or tenement, and five acres of land, meadow and pasture, with the appurtenances thereto belonging; to *J. Thomas*, tenant of one other messuage or tenement, and ten acres of land, meadow and pasture, with the appurtenances thereto belonging; to *W. Alner*, tenant of another messuage or tenement, and seventy acres of land, meadow and pasture, with the appurtenances thereto belonging; to *M. Wheeler*, widow, tenant of one other messuage or tenement, and sixteen acres of land, meadow and pasture, with the appurtenances thereto belonging; to *J. Mannell*, tenant of one other messuage or tenement, and sixteen acres of land, meadow and pasture, with the appurtenances thereto belonging; to *G. Sheering*, tenant of one cottage and half an acre of land thereto belonging; to *Pelham*, widow, tenant of one messuage or tenement, and seventy acres of land, meadow and pasture, with the appurtenances thereto belonging; to *P. Maver*, tenant of one other messuage or tenement, and three acres of land, meadow and pasture, with the appurtenances thereto belonging; to *C. Billis*, tenant of one other messuage or tenement, and four acres of land, meadow and pasture, with the appurtenances thereto belonging; all and singular which said lands and tenements last-mentioned are in the manor of *Blaxworth* aforesaid, and situate lying and being within the parish of *Blaxworth* aforesaid, of which *George Savage, Knt.* in the writ aforesaid named, on the day of the rendition of the judgment in the said writ specified, and after, was seised in his demesne as of fee; that they and every of them should be before the said lord the king at the day and place in the said writ contained, to shew, do, and receive as that writ commands and requires. And he farther certifies to the same lord the king, that there are not, nor is, any other tenants or tenant of any other lands or tenements of which the said *George Savage*, on the said day of the rendition of the judgment aforesaid, or ever after, was seised in his demesne as of fee in his bailiwick, to whom he could give notice: And hereupon the said *John Adams* produces here in court the letters of administration aforesaid to the said *Sarah*, whereby it sufficiently appears to the Court here, that he the said *John Adams* is administrator, and thereof hath the administration, &c. And the same *John Adams* prays execution thereof against the said *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jehonadab Savage*, *William Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joseph Jeffries*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joseph Mannell*, *George Sheering*, *Pelham*, widow, *Peter Maver*, and *Christopher Billis*, for the

 debt

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debt and damages aforesaid, on the lands and tenements aforesaid to be levied, to be adjudged to him, &c.

Plea, that the defendant had nothing in the land at the time of the judgment.

And the said *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jehonadab Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joseph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joseph Mannell*, *George Sheering*, *Pelham*, widow, *Peter Maver*, and *Christopher Billis*, on the same *Friday* next after the octave of *St. Martin*, being solemnly called by *Peter Templeman* their attorney, come and say, that the said *John Adams* ought not to have his execution against them for the debt and damages aforesaid on the manor, messuages, cottage, lands, and tenements aforesaid, in the return of the said writ of *scire facias* mentioned, whereof they are returned tenants; because they say, that the said *George Savage*, *Knt.* in the writ aforesaid of *scire facias* mentioned, or any other person or persons to the use of him the said *George Savage* and his heirs at the time of the rendition of the judgment aforesaid in the same writ above-mentioned, or ever after, was not, nor were seised of the same manor, messuages, cottage, lands, and tenements, or of any parcel thereof, in his demesne as of fee: and this they are ready to verify: wherefore they pray judgment if the said *John Adams* ought to have his execution against them for the debt and damages aforesaid on the manor, messuages, cottage, lands, and tenements aforesaid, &c.

Replication that he was seised in fee.

And the said *John Adams* says, that he by anything by the said *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jehonadab Savage*, *William Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joseph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joseph Mannell*, *George Sheering*, . *Pelham*, widow, *Peter Maver*, and *Christopher Billis*, before alledged, ought not to be delayed from having his execution aforesaid against them for the debt and damages aforesaid on the manor, messuages, cottage, lands, and tenements aforesaid, in the said return of the writ of *scire facias* aforesaid mentioned, whereof they are returned tenants; because he says, that the said *George Savage*, *Knt.* on the said day of the rendition of the judgment aforesaid in the writ aforesaid above-mentioned, and long after, was seised of the same manor, messuages, cottage, lands, and tenements, in his demesne as of fee, as by the return of the writ aforesaid is above supposed: and this he prays may be inquired of by the country. And the said *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jehonadab Savage*, *William Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joseph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joseph Mannell*,

George

George Sheering, Pelham, widow, Peter Maver, and Christopher Billis, thereof likewise, &c. Therefore let a jury thereon come before the lord the king at *Westminster* on *Thursday* next after the octave of the *Purification of the Blessed Virgin Mary*, and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

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*[134]

* Adams *against* The Terre-tenants of Savage. Case 184.

THE plaintiff brought a *scire facias* against the defendants, reciting a judgment obtained by his intestate against *Savage* in such a Term and year in the king's bench at *Westminster*, commanding the sheriff to warn in all the tenants of lands whereof *Savage* at the time of the judgment was seised; and in the count, in the end of the writ, he shews that his intestate died so, &c. and administration of all his goods and chattels were committed to him the plaintiff by *J. S. Archdeacon of Dorset* in the county of *Dorset*, to whom it did belong to grant it.

Archdeacons have only a *prescriptive* and not a *common right* to grant administrations; and a judgment is *bona notabilia* in the place where it is given; if therefore a judgment be given at *Westminster*, and the administrator of the plaintiff bring a *scire facias* against the *terre-tenants* of the defendant, stating that the intestate died on such a day, and that administration was committed to him by the *archdeacon of Dorset*; the Court will *ex officio* take notice that the administration, as to this judgment, is *void*; and the administrator shall *take nothing by his writ*.

S. C. Pect. 199. 226.

S.C. 1. Salk. 40.

S.C. 2. Salk. 601. 679.

S.C. 3. Salk. 321.

S. C. Lilly Ent. 398.

The *terre-tenants* returned traverse the said *Savage*'s being seised of any of the lands whereof they are returned tenants; and it was found against them.

DARNELL, *Serjeant*, in last *Easter Term* was twelvemonth, moved in arrest of judgment, that the plaintiff in his writ shews that he has not a right to revive the judgment, for this judgment is *assets* here at *Westminster*, where the record lies; and the administration committed by the *Archdeacon of Dorset*, which he shews for his title, is utterly void, here being *bona notabilia* out of his jurisdiction.

EYRES to this offered for answer, that though the Court will judicially take notice of ecclesiastical divisions, as that there are two *provinces*, and so many *dioceses* in every province, as they will do of all the several counties of *England*; yet they cannot take judicial notice within what diocese such or such a place is, no more than they will within what county such a hundred is: so they cannot take notice here but that the *Archdeaconry of Dorset* is within the *diocese of London*, and then this may be an administration well committed.

SECONDLY, Since we have averred that it belongs to him to grant it, and that he did grant it, you will give him that credit as to believe that he did it well, at least until the contrary appear, which cannot be here.

PER CURIAM. We who sit here, and hold the queen's courts, are bound to take notice under what ecclesiastical juris-

7 Mod. 15. 1. Lut. 399, 400. 1. Salk. 39, 40. Carth. 148 3. Mod. 324. Post. 241, 242. 8. Mod. 65. 5. Mod. 225. 1. Com. Dig. "Administrator," (B 4.) 8. Mod. 225. 244. 10. Mod. 272. 11. Mod. 223. 12. Mod. 107. 385. 2. Barnes, 137, 142. Stra. 412. 631 716. 781. 1. Ld. Ray. 562. 2. Ld. Ray. 855. Com. Rep. 17. 1. Peer Wms. 76. 3. Peer Wms. 349. 370.

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diction we are; and if so, we must see that we are not under the *Archdeacon of Dorset*; and by consequence, an administration granted by him cannot intitle one to bring an action upon our judgment: Archdeacons as such have no power to commit administration, though most in *England* do it, but not *quatenus* archdeacons, but by a prescriptive right, and sometimes they do by *peculiars*, and sometimes by themselves; and in those cases you must plead *cui administratio in hâc parte pertinuit:* and here the administration is absolutely void, and so would be if committed by the bishop, whose archdeacon this man is, And suppose, as it is urged, that we cannot take notice but that the *archdeaconry of Dorset* is part of the *diocese* of *London*, yet at least we must take notice that the place where we sit here is not of it: and the administration *quoad* this judgment is void,

*[135]

If an administrator bring a *scire facias* on a judgment recovered at *Westminster*, stating himself "administrator," and reciting, as his title to sue, letters of administration granted by the *archdeacon of Dorset*, the error of suing for *bona notabilia* in one diocese on administration granted in another, is not cured by the terre-tenants pleading to *the merits*, and omitting to traverse the validity of the administration; nor can the words "by the *archdeacon* of *Dorset*" be rejected as surplusage; but if he had only alledged himself generally, "administrator of the goods, &c." it would have been good.—Sty. 283. Cro. Jac. 10. 1. Sid. 238. 2. Vent. 84. Hob. 117.

* And this Term BROTHERICK moved for judgment upon this ground, *viz.* that though the plaintiff has shewn a bad title, yet the writ of *scire facias* being good, and he calling himself *administrator*, and the defendants not traversing, or taking any advantage of the invalidity of the administration, but pleading to the merits, they thereby admit the person intitled to sue, and shall not come, when the right is tried against them, to controvert what they have before waived to insist upon, but have admitted: and here if we had not said any thing by whom administration was committed to us, and they had thus pleaded over, it had been good. In the case of *Gidley v. Williams*, in this court (*a*), an administrator brought an action of debt upon a bond to the intestate, setting forth, that *Gidley* was administrator of such a one, and that the defendant did not pay to the testator in his life, or to *Gidley* the administrator since his death; but he did not alledge that administration was committed to him; and after *non est factum* pleaded, and a verdict for the plaintiff, it was moved, that the defendant had admitted the plaintiff to be administrator by pleading in chief, and the opinion of the Court was, that the declaration was made good; for *per Curiam*, though that would be a fatal exception upon *demurrer*, it is helped by the pleading over *non est factum*, whereby you admit him capable to sue. And as this case stands, if we had said only that we were administrators, or that administration was committed to us, without more, we should have judgment; then there being enough said, that administration was committed to us, the other words, "by the *Archdeacon of Dorset*," shall be rejected; and for rejecting words that would vitiate matter which was well without them, he quoted the case of *Bold v. Steers* (*b*), where a lease was made to begin after the death of *Thomasine Chapman* and of *Thomas Chapman*; and it was alleoged that the *aforesaid Thomasine Chapman* and *Thomas Champman* were

(*a*) Trinity Term, 12. *Will.* 3. 12. See also Dawes *v.* Harrison, 2. Mod. 65. Mod. 443. 1. Salk. 37. 1. Ld. Ray. 634. (*b*) Cro. Eliz. 637.

dead;

dead; and it was held, that the words "the aforesaid *Thomas*" were sufficient, and the addition of his surname vain, and therefore would not vitiate. A parson made a lease (*a*), and was deprived by his ordinary, from which sentence he appealed to the archbishop; after deprivation and before the appeal another became parson, and made a lease; and, in the contest between the two lessees, the second pleaded the deprivation of the lessor of the first; to which they replied, that he had appealed from the said sentence to the archbishop *in curiâ prærogativâ suâ de arcubus*; and though the *court of prerogative* be not the *court of arches*, yet the Court held, that it sufficed to shew an appeal to the archbishop's prerogative court, and the rest, rather than vitiate, should be rejected. In an avowry for rent (*b*), the avowant made title as grantee of a reversion, without shewing *attornment*; the defendant pleaded *rien arreare*; and it was held, that though upon *demurrer* the want of shewing *attornment* would be fatal, yet it would be well enough now, because the defendant admitted it by his plea.

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* BUT NOTE, There is another reason given for that judgment, viz. that it was after verdict, and so cured by the statute. And *[136]
it said, the judgment must be upon the writ and return, and not upon the declaration, for by pleading over they allowed that to be well.

DARNELL, *Serjeant*, answered, That here they not only not shewed that they had a title, but that they had a bad one: they took upon themselves to shew a title, and have shewed a bad one; and when they shew and set out a bad one, the Court cannot intend that they have a good one, but, on the contrary, that they have shewed the best they can. And he utterly denied, that a mistake in setting out that which was not necessary to set out, would not hurt; for if a man will take upon him to plead a general act of parliament specially, and fails therein, though he need not to have set it out specially, yet it will spoil all: and if they have judgment in this case, the defendant would be liable to the action of an administrator of the archbishop.

HOLT, *Chief Justice*. If the plaintiff had not set forth what kind of administration he claimed by, but had only generally alledged himself "administrator of the goods and chattels of the intestate," and the defendant had not put you upon shewing it by craving *oyer* of the *letters of administration*, as he might have done, but had pleaded over, it would have been an admission of the plaintiff's having a right of suing as administrator, as he had alledged. It is true, the writ need not mention any thing of administration's being committed to the plaintiff; but the course is, to suggest upon THE ROLL after the writ is come in, that administration was committed to him, and to *profert* the *letters of administration* to shew it: but in debt, or *scire facias* on a judgment

12. Mod. 104. 443. 537.

(*a*) Sir T. Jones, 219. Dyer, 240. pl. 56. (*b*) Palm. 74. 2. Lev. 234.

here

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here at *Westminster*, which is local, you make your title as administrator by virtue of letters of administration by the *Archdeacon of Dorset*, and without doubt that is no good title; and when you yourself affirm this to be your title, how can we intend that you have another? for of your own shewing this is your title, which is manifestly bad. There is a vast difference, where a title does not appear fully for the plaintiff, and the party will not controvert with him about that; for there, if the party were not well satisfied with plaintiff's title, it may be well presumed that he would have insisted on it in due time; and where the plaintiff himself shews that he has no title, for there the Court has no room for intendment.

THE WHOLE COURT agreed, that where the matter is indifferent to be well or ill, and the party pleads over, they will intend it well; and said that all the cases put by BROTHERICK were, where it was indifferent: and this properly is not an imperfection in shewing of *letters of administration*, but it is shewing such as are absolutely void as to the intestate's whole estate, because there are *bona notabilia*.

*[137] * But THE COURT doubted what judgment to give, whether to *quash the writ* or to *bar the action*, and took time to consider of that (*a*).

A judgment arrested in *scire facias* will not intitle the defendant to *costs* under the 8. and 9. *Will.* 3. c. 11.

And after, before any judgment entered, the defendant moved for *costs* upon the statute of 8. & 9. *Will.* 3. c. 11. the words whereof are, "that in all suits upon any writ or writs of *scire facias* the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fieri facias*, or *elegit*."

DARNELL, *Serjeant*, insisted, that if this had been a *special verdict*, until Court had determined the point, it was not *a verdict* for either side; but now that they were of opinion that the plaintiff ought to have no judgment, it would be the same as if it had been a *special verdict*, and then it would have been for the defendant (*b*), and it is within the mischief remedied by the statute, for here the plaintiff knew and shewed that he had no right to give the defendant trouble: and if this *scire facias* had been brought by him as administrator of *J. S.* and had recited a judgment obtained by *J. N.* should not we have costs?

(*a*) It is said in the report of the same case in *Salkeld*, that the *scire facias* was abated by judgment *quod nihil capiat per breve*, which, in this case, THE COURT said was a bar to the *action of the writ*, but not to *the action*; and that the reason of the judgment was, because the plaintiff having made this administration his title, the Court could not intend any other, and the pleading over could not admit *that* to be a title which to the Court appeared to be no title, S. C. Salk. 40.: and by THE WHOLE COURT, judgment was given for the defendant. S. C. 2. Ld. Ray. 856. See also S. C. post. 199. 226.

(*b*) See Alsop v. Cleydon, Cro. Eliz. 465.

HOLT,

HOLT, *Chief Justice*. No; because it is out of the words of the statute, if the plaintiff have a verdict, as here: and our judgment may be, "*licet* verdict be for plaintiff (*a*), *quia apparet Curiæ* that he "has no right to recover; *ideo consideratum quòd nil capiat per* "*billam*." ABAME against THE TERRE-TENANTS OF SAVAGE.

And IT WAS ADJUDGED that there should be no costs (*b*).

(*a*) See 1. Vent. 33.

(*b*) This statute does not extend to *executors* or *administrators*, Bellew *v.* Aylmer, 1. Stra. 188. and therefore if plaintiff or defendant sue or be sued in that capacity, he is not liable to costs, Hullock on Costs, 303. See also Hiner *v.* Whitbread, Prac. Reg. 378. that if the defendant has appeared to, or pleaded in abatement of a *scire facias*, he shall have no costs, although the writ be quashed on the motion of the plaintiff; but if there be no appearance entered, or plea pleaded, the plaintiff in such case shall pay costs, Pocklington *v.* Peck, 1. Stra. 638.

Anonymous. Case 185.

A barrister may be punished for mal-practice. *Qu.* Whether being called to *the bar* discharges a person from being *attorney*.

3. Burr. 1256. 2. Hawk. P. C. ch. 22. s. 30.

IN a case where *Mr. M.* formerly *an attorney* of the court, now *counsellor at law*, was accused of foul practice in his profession,

THE COURT said, though he be now *a counsel*, yet perhaps that will not discharge him from being *an attorney* still; and then we may get his demands taxed as such: And does any body think but a *counsellor at law* is a kind of minister of justice and right, and, as such, punishable for misbehaviour in his profession?

And HOLT, *Chief Justice*, said to him, Will you have the point tried, Whether a *counsellor at law* may commit extortion? and with respect to the circumstances of this case, said, that this was dragooning of people out of their money.

The Queen *against* Best and Others. Case 186.

An indictment for conspiring falsely to charge another with being the father *of a bastard*, is good, although it do not aver that the defendant was *not the father*; for the conspiracy is the gist of the offence.

LONDON (*to wit*), HERETOFORE, that is to say, on *Friday* the fourteenth day of *January*, in the second year of the reign of our lady *Anne*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, queen, defender of the faith, &c. at the general quarter-sessions of the peace of the lady the queen, holden for the city of *London* at the *Guildhall* of the said city, and within the same city, before *John Parsons*, knight, mayor of the city of *London*, *Robert Clayton*, knight, *William Pritchard*, knight, *William Gore*, knight, aldermen in the city aforesaid, and *Salathiel Lovel*, one of the serjeants at law of the said lady the queen, and recorder of the said city, and others their fellows justices, assigned to keep the peace in the city aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same city, by the oath of twelve jurors, honest and lawful men of the city of *London* aforesaid, then and there being sworn and charged to inquire for the said lady the queen for the

the body of the city aforesaid, it was presented, that *Richard Best*, late of *London*, yeoman, *Philip Jackson*, late of *London*, yeoman, *Richard Grimes*, late of *London*, yeoman, and *Elizabeth Church*, late of *London*, spinster, otherwise called *Elizabeth Ellis*, late of *London*, spinster, otherwise called *Elizabeth Carter*, late of *London*, spinster, being persons of evil name, fame, and dishonest conversation, and not endeavouring to seek their living by honest labour, according to the laws of this kingdom of *England*, but compassing, devising, and conspiring among themselves by what unlawful means they might unlawfully and unjustly obtain and acquire into their hands and possession the goods, chattels, and money of the honest liege men and subjects of the said lady the queen, to maintain their dishonest and diabolical course of living, on the eighteenth day of *December*, in the second year of the reign of our lady *Anne*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, queen, defender of the faith, &c. falsely, unlawfully, wickedly, and craftily contriving, intending and conspiring and devising among themselves to deceive and defraud one *Peter Pickering* the younger, of *London*, mercer, not only of his money, but also to deprive him the said *Peter* of his good name, fame, estate, and credit, and to bring the said *Peter* into the greatest hatred, scandal, contempt, and infamy, amongst all the liege men and subjects of the said lady the queen, on the eighteenth day of *December* in the second year abovesaid at *London* aforesaid in the parish of *Saint Vedast*, otherwise *Foster's*, in the ward of *Farringdon Within*, falsely, unlawfully, deceitfully, maliciously, and for the cause of wicked gain conspired, contrived, consulted, and agreed among themselves falsely, unjustly, wickedly, and diabolically to charge and accuse the said *Peter Pickering* to be the father of a child whereof the said *Elizabeth Ellis*, otherwise *Church*, otherwise *Carter*, was then pregnant, as they then and there pretended; and by the conspiracy among them so as aforesaid before had, then and there with force and arms, &c. they did falsely and maliciously affirm, and every one of them then and there did falsely and maliciously affirm, that he the said *Peter* then lately before had carnal knowledge of the body of her the said *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, and had carnally known the said *Elizabeth Ellis*, otherwise *Church*, otherwise *Carter*, and that he the said *Peter* was the father of the pretended child whereof the said *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, then was pregnant, as she asserted and pretended: and that for the further execution of the premises, they the said *Richard Best*, *Philip Jackson*, *Richard Grimes*, and *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, then and there agreed and concluded amongst themselves, that he the said *Richard Best* should go to the said *Peter*, and should falsely, wickedly, maliciously, and for the sake of wicked gain should charge and accuse him the said *Peter*, that he the said *Peter* then lately before had had carnal knowledge of the body of the said *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, and had carnally known her the said *Elizabeth Church*, otherwise *Ellis*, otherwise

wise *Carter*, and that he the said *Peter* was the father of the said pretended child whereof they pretended that she the said *Elizabeth* was pregnant. And the jurors aforesaid upon their oath aforesaid further say, that the said *Richard Best*, in execution of the premises, and according to the said conspiracy, consultation, and agreement among them the said *Richard Best*, *Philip Jackson*, *Richard Grimes*, and *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, as aforesaid before had, afterwards, to wit, on the said eighteenth day of *December* in the second year aforesaid, at the parish and ward aforesaid, and at divers other places within the city aforesaid, with force and arms, &c. falsely, wickedly, maliciously, diabolically, and for the sake of wicked gain, in the hearing of many faithful liege men and subjects of the said lady the queen, charged and accused the said *Peter*, that he the said *Peter* then lately before had had carnal knowledge of the body of the said *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, and had carnally known her the said *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, and that he the said *Peter* was the father of the said pretended child whereof they affirmed the said *Elizabeth Church*, otherwise *Ellis*, otherwise *Carter*, then was pregnant, to the great damage, scandal, and defamation of the said *Peter Pickering* the younger, to the worst and most pernicious example of all others offending in the like case, and against the peace of the said lady the now queen, her crown, and dignity; which said indictment the lady the now queen afterwards for certain causes hath caused to come to be determined before her: wherefore the sheriffs of *London* were commanded, that they should cause them to come to answer, &c. and now, to wit, on *Wednesday* next after five weeks of *Easter*, in this same Term, before the lady the queen at *Westminster*, come the aforesaid *William Best*, *Philip Jackson*, and *Elizabeth Ellis*, by *Benedict Brown* their attorney, and, having severally heard the indictment aforesaid, say, that they do not apprehend that the said lady the queen will or ought farther to impeach or occasion them the said *Richard*, *Philip*, and *Elizabeth*, or any of them, for the premises, because they say, that the indictment aforesaid is not sufficient in law, to which they and each of them have no necessity, nor are they bound by the law of the land in any manner to answer: and for the insufficiency thereof they pray judgment, and that they may be dismissed by the Court here concerning the premises, &c.

And *Samuel Astry*, knt. coroner and attorney of the lady the queen, in the court of the said queen, before the queen herself, who prosecutes for the said lady the queen, in this behalf for the said lady the queen saith, that the indictment aforesaid, and the matter therein contained, are good and sufficient in law to compel them the said *Richard Best*, *Philip Jackson*, and *Elizabeth Ellis*, to answer the said indictment: wherefore for want of a sufficient answer in this behalf he prays judgment, and that they by the Court here may be convicted of the premises, &c.

THE

Case 187. **THE CASE.**

An indictment lies for a conspiracy before acquittal, but not an *action on the case* till acquittal.

THE defendants were indicted for conspiring to get money unjustly, &c. from one *Peter Pickering*, and to bring about that wicked purpose, *falsely* to charge him with being the father of a certain *bastard child*, &c. and that in pursuance of such conspiracy they did *falsely* charge and affirm him to be the father of it.

The exception was taken, that it did not aver that he was not [138] the father of it.

S.C. post. 185. S.C. 1. Salk. 174. S.C. Holt, 151. S.C. 2. Ld. Ray. 1167. S.C. 3. Ld. Ray. 17. Post. 169. 185. Carth. 417. Skin. 44. 1. Salk. 13, 14, 15.

PER CURIAM. The *gist* is the *falsely* conspiring to charge falsely. And it is said further, that they did falsely charge, &c. and *an indictment* lies for the falsehood before the party is acquitted of it; but *an action on the case* lies not * until acquittal:—and this was said to be too frequent an offence to be quashed upon motion; that they would no more quash it than they would an indictment for *barratry*, or *keeping a bawdy house*.

And it was denied to be quashed.

2. Mod. 152. 306. Post. 169. 1. Vent. 303. 8. Mod. 320. 1. Hawk. P. C. ch. 72. s. 2. Ld. Ray. 81.

Case 188. Kent *against* ———.

A record in trespass *vi et armis* is not removed by a writ of error on a judgment in trespass *on the case*.

ERROR of a judgment in trespass *vi et armis* in the common pleas, and the writ was of a judgment in a plea of trespass upon the case.

PER CURIAM. It is no good writ to remove the record; for though trespass generally, and upon the case, may be laid *vi et armis*, yet there is very great diversity between their natures; the one is grounded upon the *very unlawful act*, the other upon the *whole circumstances* of the case.

A misprision of the clerk in making out a writ of error may be amended.

BUT IT WAS AGREED, that if right instructions had been given to the officer who made out the writ, and that were made out by affidavits, they would amend by the statute of 8. *Hen.* 6. c. 12. s. 2.

1. Co. 160. b. Hob. 118. 129. Cowp. 407.

A writ of error cannot be quashed, until it is entered on THE ROLL.

And PER CURIAM, The defendant cannot move to quash the writ until it be entered on THE ROLL, and he appear to it.

And the writ was quashed *nisi*.

Case 189. Anonymous.

A bill of exchange bears interest from the time it is demanded.—Beawes L. M. 461. Stra. 649. 910. 2. Burr. 1086. Kyd. on Bills, 89, 90. 2. Term Rep. 52.

PER CURIAM. Interest upon a bill of exchange commences from demand made; and therefore if there be no demand made until action brought, the defendant may plead tender and

refusal,

refusal, and *uncore prist*, and so discharge himself of interest; but if it be the defendant's fault that demand could not be made, as if he were out of the kingdom, there want of demand ought not to prejudice the plaintiff.

Lewis *against* Jones. Case 190.

A judgment at a sessions of the king holden before the queen, is erroneous.

UPON a writ of error of a judgment in *Wales*, the *placita* were, &c. at a great session of our *lord the king*, &c. holden "before *A.* and *R.* justices of our *lady the queen*, &c."

AND IT WAS HELD a fatal *variance*.

On a writ of error on a judgment from *Wales*, a *certiorari* to inform the Court may issue, although the record has been amended before.

But IT WAS DOUBTED, Whether, if they would amend below, a *certiorari ad informandum conscient.* ought not to go?

And at another day a motion was made by WILLIAMS for a *certiorari*, that they might amend below, and certify it right up.

But it appearing to THE COURT, that a former writ of error had been brought, and a *certiorari*, and an amendment of such faults as had been then discovered, and that this was the second writ and faults, still they said, they would consider well of it before they would send any more *certiorari*'s: for when would there be an end at this rate?

And THE COURT gave leave to move again.

And it was afterwards granted, *absente* HOLT, *Chief Justice*.

* Anonymous. Case 191.

A *mandamus* lies to justices to inquire of a *forcible entry*.

WELLS moved for a *mandamus* against *Golson* and others, justices of peace of *Ipswich*, to issue their precept to inquire of a force, upon affidavits of a *forcible entry*.

And it was granted.

S. C. post. 164.

Parkins *against* Woollaston. Case 192.

In debt on a recognizance against bail, if the defendant plead "no *capias*" against the principal, and the plaintiff reply "a *capias prout patet per recordum*," REJOINDER that "a writ of error was allowed before the return of the *capias*," is a *departure* from the PLEA.

DEBT upon a recognizance against bail, and plea that there was no *capias* against the principal: A REPLICATION averring a *capias prout patet per record'*, in the common pleas: REJOINDER, that there was a *writ of error* taken out, and allowed before the *capias* was returned and filed; and, ON DEMURRER,

IT WAS ADJUDGED, that *the rejoinder* was *a departure* from *the plea*; for it is a new matter, which does not agree with or inforce the matter of the plea, for the plea is, that there was no *capias*, and the rejoinder says, there was *a capias*, but that it was superseded,

S. C. ante, 130. S. C. 1. Salk. 221. 1. Lev. 225. Cro. Jac. 98. Ld. Ray. 157. 342 1097. 1177. 1259. 1452.

and

PARKINS *against* WOOLASTON.

and there is a great difference between no *capias* and a *capias* superseded, for the superseding does not make it null, or no *capias*; but only suspends the fruit or effect of it; and one must distinguish between the writ itself, and the effect of it. This *capias*, though superseded, is nevertheless a writ; and therefore if, after allowance of it, the sheriff, before *a supersedeas* served upon him, execute it, the writ shall excuse him, which a void writ could not do: and if the *writ of error* had been quashed before the return of the *capias* were out, then this writ might be well executed. And the case of *Vere v. Smith (a)* was allowed for law; it was debt upon bond to account for money; the defendant pleaded, that he did account; the plaintiff replied, that the defendant had received twenty pounds at such a time, of which he gave him no account; the defendant rejoined, that he was robbed of them, whereof he gave notice to the plaintiff; and surely that maintains his first plea, for it was a legal account of them.

And by THE WHOLE COURT, judgment was given for the plaintiff.

See ante, 130.

NOTE, It seemed ill for another reason, because the allowance of a writ of error before the return and filing, if it were returned before, did not obstruct the filing.

(*a*) 2. Lev. 5.

* [140]

Case 193.

Leonard *against* Stacy.

If a sheriff, or any person in his aid, make *replevin* after a claim of property notified to him, he is a trespasser *ab initio*.

TRESPASS for entering into the plaintiff's house, and taking away his goods: the defendant justifies by virtue of *a replevin* out of THE SHERIFF'S COURT in *London*, and a *precept* thereupon to *J. S.* an officer, and that the defendant came in aid of him *(b)*; the plaintiff replies, that before the taking away the goods, he *claimed property* in them, and gave notice thereof to the defendant.

S. C. ante, 68. S. C. Holt, 143. 2. Roll. Abr. 561. Lane, 90. 8. Co. 146. 2. Lev. 95. 4. Mod. 391. Stra. 509. 1184. 1238. Ld. Ray. 217. 309. 984. 4017. 6. Com. Dig. "Trespass," (C. 2.) 2. Term Rep. 335.

The question, upon a special verdict, was, Whether the taking away after *claim of property*, and notice thereof, did not make him a trespasser *ab initio?*

* THE WHOLE COURT held, that he was a trespasser *ab initio*; for although the claim ought to be made to the sheriff or his officer, because a claimer to a person who comes to their assistance is not enough to make the execution illegal, if the officer do not desist; yet if it be notified to him who comes in aid that a claim of property is made, he at his peril ought to desist.

And by ALL THE COURT, judgment was given for the plaintiff.

(*b*) See Cameron *v.* Reynolds, that actions for breach of duty of the office of sheriff must be brought against the *high sheriff*, though by default of the under-sheriff or bailiff, Cowp. 403.

Heins *against* Hancock. Case 194.

ERROR of a judgment in ejectment in *Ireland*; and it was assigned for error, that the denomination of one of the parcels was "*a kneave of land*," which was said to be an insensible word; but upon certificate of THE CHIEF JUSTICE of the king's bench in *Ireland*, that it was a denomination well known there, the judgment was affirmed.

Ejectment in *Ireland* for "*kneave of land*," is good.

Cro. Car. 179. 512. 1. Mod. 90.

Hard. 57. Stra. 71. 5. Burr. 2672. 1. Burr. 623.

Anonymous. Case 195.

A WRIT OF PRIVILEGE was moved for to have a clergyman, who appeared to have no cure of souls, privileged from the office of overseer of the poor.

A *clergyman* is exempted from serving the office of *overseer*.

And though HOLT, *Chief Justice*, seemed against it, because, by him, their privilege of exemption is only extendible to their spiritual revenues, and if in any case the privilege be personal, it is only from common-law offices, and specially if they are without cure, as here;

Ld. Ray. 265. 2. Stra. 1107.

Yet THE OTHER THREE JUSTICES were strongly against him: but however, for his lordship's satisfaction, they desired that it should be stirred again (*a*).

(*a*) DOCTOR LEE, archdeacon of *Rochester*, was allowed a *writ of privilege* to discharge him from the office of *expenditor* for *Rumney Marsh*, to which he had been elected by the commissioners of sewers, in respect of some land he had within the level. 1. Mod. 282. S. C. 1. Lev. 303. S. C. 1. Vent. 105. NOTE *to former edition*. Same point resolved in the case of the Vicar of *Dartford*, 2. Stra. 1107. By 1. *Will. & Mary*, c. 18. s. 11. *dissenting ministers*, and by 31. *Geo.* 3. c. 32. *Roman catholic priests*, are, under certain conditions, exempted from serving the office of overseer, and therefore a *clergyman* of *the church of England* may be supposed exempted; for it cannot be imagined, that the legislature intended to confer greater privileges on *sectaries* than the *regular clergy* were understood to possess: but there does not appear to be any decided case precisely to this point.

Anonymous. Case 196.

PER CURIAM. If a witness come voluntarily to give evidence without a *subpœna*, consideration shall be had of the party's charge in maintaining him (*a*).

A witness though not *subpœna'd*, shall have his expences.

2. Stra. 1150. Dougl. 557.

(*a*) See 5. *Eliz.* c. 9. s. 12.

The Queen *against* Pugh and Others. Case 197.

AN INQUISITION was taken before two justices of the peace against the defendant for *a riot*, upon the statute of 13. *Hen.* 4. c. 7. And the caption was, "INQUISITIO *capta* "*pro*

An inquisition for a riot need not specially pursue the words of the statute 13. *Hen.* 4. c. 7. but may conclude generally *contra formam statuti.*—S. C. Holt, 636. Cro. Car. 564. 2. Hawk. P. C. ch. 23. s. 70. ch. 25. s. 100.

THE QUEEN *against* PUGH AND OTHERS.

"*pro domina regina in com. H. super sacramentum, &c. duodecim* "*proborum et legalium hominum, &c. qui adtunc et ibidem in-* "*pannelat' jurat. et triat', &c. ad inquirend' de riotis contra* "*formam stat',*" generally.

BROTHERICK took exception, that in the whole inquisition there was not a word of the statute of 13. *Hen.* 4. c. 7. and quoted *Crompton* (*a*), and *Lambard* (*b*), that precedents on this

* [141] statute * particularly describe the statute, and shew the whole proceedings of the justices to be precisely pursuant to it.

Sed non allocatur.

Justices of peace may inquire of riots under 13. *Hen.* 4. c. 7. and fine under 8. *Hen.* 6. c. 9.

2. Salk. 593, 594, 595.

3. Mod. 141.

For PER CURIAM, the justices have power to inquire of all riots and routs whatsoever by this statute; and if a *forcible entry* be made by three, for fewer cannot commit *a riot*, the justices may inquire of it by the statute of 13. *Hen.* 4. c. 7. and fine according to the statute of 8. *Hen.* 6. c. 9. and award restitution; for a subsequent statute that gives a greater punishment, does not take away the power given by a precedent statute (*c*).

1. Hawk. P. C. c. 65. s. 39.

In what manner justices shall record a riot.

And the inquisition may be taken any where else as well as upon the place; but if the information given to the justices be, that the riot continues, they ought to go and convict them, and record it upon *the view*, under penalty of a hundred pounds; but they may inquire, where the riot does not continue, any time within a month.

Justices to inquire within the month.

1. Hawk. P. C. ch. 65. s. 31.

But PER HOLT, *Chief Justice*, If they will not inquire within *the month*, they forfeit the penalty; but notwithstanding, they may inquire after, *viz.* when they have issued a precept within the month to inquire.

* * * * *

Distinction between *a riot* and an *unlawful assembly*.

Skinner, 219. Carth. 383. 2. Salk. 593. 595. Holt. 92. 3. Burr. 1263.

And here PER CURIAM, If a number of people meet to do an unlawful act, and after they have met they do it not, that is an *unlawful assembly*, but not *a riot*. Also, If they meet to do an act that in itself is not lawful, but is not an act of violence or force, and they do it, that is no *riot*, but an *unlawful assembly*; and upon this foundation, the assembling in CONVENTICLES in the time of King *Charles the Second*, by the better opinion, was held no riot.

1. Hawk. P. C. ch. 65. s. 5. Ld. Ray. 965. 1210.

(*a*) Cromp. Just.

(*b*) Lamb. Just

(*c*) See Rex *v.* Cator, 4. Burr. 2026. and Rex *v.* Davis, Cases in Crown Law, 228. that a statute inflicting a less punishment is a virtual repeal of a statute inflicting a greater punishment for the same offence.

Case 198. Anonymous.

The Court will not grant an attachment in the first instance on the *affidavit of a rescue*; but if the sheriff return *a rescue*, that is of itself a *conviction*, and the *attachment* will go of course.—Post. 173. 210. 3. Lev. 46. Annally, 112. 2. Salk. 586. 8. Mod. 110. 240. 342. 3. Peer Wms. 484. Ld. Ray. 589. 12. Mod. 10. 94. 247. 556. Sayer, 281. 1. Stra. 531. 624. 1226. 4. Burr. 2129. Tidd's Prac. 110.

AN AFFIDAVIT was made of *a rescous* of one taken by *mesne process*, and thereupon *an attachment* was moved for.

PER

Per Curiam. Upon a return of *rescous* it would go of course. Anonymous.

But Holt, *Chief Justice*, would distinguish between this and the case of *rescous* upon a writ of execution (*a*), for there the sheriff cannot return *a rescous*, and therefore the Court can have no other ground for *an attachment* but affidavits, and ought to be contented therewith; but here *a rescous* might be returned, which being matter of RECORD, and by consequence a better motive, ought to be given to the Court.

Yet THE COURT seemed against him, and a rule was granted to shew cause why ATTACHMENT should not go.

(*a*) Touching the difference of rescues on *mesne process*, and those of persons taken in *execution*, see 1. Cro. 33. 77. 175. 2 Cro. 289. 360. Pop. 189. 3. Bul. 198. Dyer, 212. 241. 3. Lev. 44. and 2. Salk. 586. Post. 220. See also Inst. Leg. 176. 394. to 400. See also 1. Hawk. ch. 65. s. 2. 11. 18. to 23. NOTE *to the former edition.*

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* Smith *against* Harmon.

Case 199.

If a plaintiff sue an executor, and die intestate after interlocutory judgment, and before writ of inquiry returned, and his administrator sues scire facias on that judgment, the defendant cannot plead a judgment recovered against him in debt on bond, and that he has no assets ultra; for the statute 8. and 9. Will. 3. c. 11. does not authorise a personal representative to make any other defence than his testator or intestate might have made to the writ of inquiry. But the writ in this case should be a SCIRE FACIAS *to hear the judgment of the Court* why the damages should not be assessed.—S.C. 1. Salk. 315. S.C. Holt, 314. 1. Keb. 55. 310. 477. 2. Keb. 548. 1. Sid. 131. Raym. 16. 55. 3. Keb. 160. 2. Salk. 8. 42. Faresl. 64, 65, &c. 1. Vern. 119. 474. Ld. Ray. 40. 263 589. 679. 1049.

THE plaintiff as administrator to *J. S.* sues out a *scire facias* against the defendant's testator, setting forth, that his intestate sued the defendant in this court in an action, &c. and that in that suit *taliter processum fuit*, that he recovered damages against him; but that before the return of a *writ of inquiry* of damages, the intestate died; and that administration was committed to the now plaintiff.

The writ commands the sheriff to summon the defendant to shew what he can, why damages should not be assessed, and judgment final for the administrator, according to the late statute of 8. and 9. *Will.* 3. c. 11. being "an act for preventing frivolous "and vexatious suits."

The defendant is returned "summoned," and appears, and as to the assessing of damages, says nothing against that; but says, that when they are assessed, that the plaintiff ought not to recover them, for that his testator (for the defendant was an executor, and was sued as such) did owe such a sum by bond to *A. B.* who sued the now defendant upon the said bond, and recovered against him, and averred it to be a just debt, and that he had assets but to such a value, which, &c.

To which plea the plaintiff demurs generally.

Pengelly, *Serjeant*, now maintained the demurrer for two reasons:

First, This matter is not pleadable within the intent of the statute, for the act never meant to give a defendant leave to plead

Smith against Harmon.

Vide 1. Salk. 8.

any thing in bar of the original action, but only to put him in the room of the first defendant, or to enable such a continuance of the suit as might have been if neither party had died, and gives the defendant the advantage of any error in law on the face of the former proceeding, in order to stay final judgment, as may appear by the very words of the act, which are: "If any plaintiff happen to "die after an interlocutory judgment, and before a final judgment "obtained therein, the said action shall not abate by reason thereof, "if such action might be originally prosecuted or maintained by "the executors or administrators of such plaintiff. And if the de- "fendant die after such interlocutory judgment, and before final "judgment therein obtained, the said action shall not abate, if such "action might be originally prosecuted or maintained against the "executors or administrators of such defendant; and the plaintiff, "or, if he be dead after such interlocutory judgment, his executors "or administrators shall and may have a *scire facias* against the "defendant, if living after such interlocutory judgment, or if he "died after, then against his executors or administrators, to shew "cause why damages in such action should not be assessed and re- "covered by him or them; and if such defendant, his executors "or administrators, shall appear at return of such writ, and not "shew or alledge any matter sufficient to *arrest the final judgment*, "&c. that thereupon *a writ of inquiry* of damages shall be

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"* awarded, which being executed and returned, judgment final "shall be given, &c." So that the statute in this case only calls in the first defendant's executor or administrator to enable him to do whatever his testator or intestate might have done, had he lived; and if he had lived, he could not have offered such a plea as this; therefore the statute makes use of the word "arrest of judgment," which is a known term in the law: and when an act of parliament makes use of such a term generally, it shall receive the same sense that the common law takes it in, and no other (*a*). By the old books, after verdict, the defendant had a day given him to plead in arrest of judgment; and this was done formerly, like other pleadings, *ore tenus* at the bar, but was always of some error appearing on the face of the record; and if at such day the defendant had made default, then any body, as *amicus curiæ*, might move in arrest of judgment such matter as the party himself might have pleaded (*b*). It is objected, that if he cannot plead this plea, it will be of great mischief to him, for he cannot plead this interlocutory judgment to the bond, there being nothing yet certain, and that if he cannot plead the judgment upon the bond to this, the final judgment will be a confession of assets, and a *devastavit* in him. To which he gave these two answers: First, that it would not be a confession of assets; for if an executor plead "*plene administravit*,"

Ante, 142. 1. Sid. 131. 1. Mod. 5, 6. 1. Ven. 235. 1. Keb. 477. 1. Keb. 594. 2. Keb. 160. 466. Hob. 162. Ante, 24. 1. Cro. 514. 1. Keb. 55. 310. 2. Leon. 263. 4. Co. 39. Hob. 124. 1. Vent. 230.

(*a*) Hob. 97.

(*b*) Vide 5. *Hen.* 7. pl. 23. a. Ro. Ab. 716. 12. *Hen.* 4. pl. 24. Rast. Brief, a precedent of a plea in arrest of judgment. Co. Ent. Err.' 95. Vide 1. Vent. 347. which does not at all seem for him. Yel. 152. 1. Cro. Jac. 220. seems more to his purpose. Note *to former edition.*

and

and the plaintiff reply "*assets*," and the defendant *relictâ verificatione cognovit actionem, nec quin ipse detinet*, this is no confession of assets (*a*). SECONDLY, he is not privy to the first judgment, but it is given upon the default of his executor, and not his; and besides, if by the statute he cannot plead this plea, without question the not doing of an impossibility will not make a man guilty of a *devastavit*. SMITH against HARMON.

SECONDLY, He argued, that the matter of the plea, in case the defendant might plead in bar, within the meaning of the statute, was not a sufficient bar; for the plaintiff's right now being upon record, is of a superior nature to a debt by bond, and therefore debt by bond recovered since the interlocutory judgment is no plea to it; for, since the statute, by the judgment the nature of the debt continues altered; but at common law, if the nature of the debt was at all altered by the interlocutory judgment, yet by the abatement of the suit before final judgment, it re-assumed its first nature again; but it is not so now since the statute, for now the party cannot resort to the first remedy by action. By DYER and MANWOOD (*b*), the award of a writ of inquiry is a kind of a judgment: and he relied much on the case of *Burnett v. Holden* (*c*).

None argued of the other side.*

* HOLT, *Chief Justice*. This statute has now established the *interlocutory judgment*, and it never was the intent of it that the executor should say more than the very party might have said, and its meaning was to put the executor in the same condition with the testator; and now he pleads in bar of the original action, which lies not in his mouth to do. The next thing is, Where is there any mischief to the executor? None at all, for judgment shall here be given, that the plaintiff shall recover *de bonis testatoris*, and in like manner of *costs*; for the judgment here shall not be as usually, "of costs of goods of the testator *si ac si non* of the executor's goods;" but such judgment shall be as shall only affect the *assets*, because it shall be just as if *judgment final* had been against the testator in his life-time. Then if he be excluded from pleading in this case, he does not admit *assets*, so he is as much at large as if the judgment had been actually compleated in the testator's life (*d*); and surely the debt, the right whereof now appears on record, is of a higher nature than debt upon a bond, though the *quantum* of it be not ascertained. If an *indebitatus* be brought against an executor, and he plead that his testator did covenant several things, and that the covenant was broke, and that the damages thereof amount to so much, and shews that he has no more assets, it will be a good plea, though the damages be not certain any more than here. If an executor voluntarily pay a [144]

(*a*) Hob. 178. 1. Roll. Abr. 929. pl. 3.
(*b*) 3. Leon. 68.
(*c*) 1. Lev. 277. Raym. 210.
(*d*) See Hawkes v. Saunders, Cowp. 293.

Smith against Harmon.

1. Leon. 44. 1. Keb. 223. 1. Lev. 165. 1. Lev. 114. 2. Vern. 117. 299. Prec. Chan. 188. 534. 10. Mod. 428. 495. 12. Mod. 291. Ld. Ray. 1320. Fitzg. 77. 2. Peer Wms. 296. 447. 3. Peer Wms. 217. 330. 400. Cases T. T. 217.

statute, before *a judgment* had against his testator, it is *a devastavit*; but if, after death of the testator, execution be taken out and executed, he may plead it to a *scire facias* upon the judgment, because he could not hinder execution; and that is *And.* 208, 209. And he put the case of *Burnet v. Holden (a)*, A testator had judgment against him upon *assumpsit*, and *scire facias* against executor thereupon; he pleads a verdict against his testator in his life-time, and judgment against him as executor upon 17. *Car.* 2. c. 8. and payment thereof; and it was held a good plea, and that now the judgment was to be considered as given against the testator himself: and HALE, *Chief Justice*, there said, that if the judgment had been at common law against the testator himself, after his death it had been well pleadable by the executor until reversed, for the executor could not falsify it in pleading.

And POWELL, *Justice*, agreeing *in omnibus*, put this case in account. The judgment is, that the defendant account; a *scire facias* lay for the executor before this statute; yet the party could plead nothing against the first judgment.

HOLT, *Chief Justice*. This *scire facias* is not so good as it should be, for it should be *scire facias ad audiendum judicium*, that is, giving them day to come and hear judgment of the Court.

* [145]

* And at another day, none appearing for the defendant, PER TOTAM CURIAM, the plaintiff had judgment *nisi* in three days, and the rule was afterwards made absolute;

Ante, 143, 144. 3. Lev. 114, 115. 1. Mod. 179. Vaugh. 94.

HOLT, *Chief Justice*, declaring, that the second point was not in question here, but that they were very clear upon the first; and that the executor could not plead *a release* here though to himself, and therefore the not pleading of it would not be a *devastavit*.

(*a*) 1. Lev. 277. 1. Mod. 6. Raym. 210.

Case 200. **Anonymous.**

Gaol delivery of Middlesex, how held in London.

HOLT, *Chief Justice*. The *gaol delivery* of *Middlesex* is held within the city of *London* by prescription, but the *oyer* and *terminer* is not so, but at *Hicks's Hall* in the county of *Middlesex*; so that though of common right the *gaol delivery* ought to be within the proper county, yet custom and usage, time out of mind, may make it otherwise.

Case 201. **Anonymous.**

Collectors of taxes cannot compel persons to come before them to pay.

HOLT, *Chief Justice*. Commissioners to assess taxes cannot compel the inhabitants to come before them out of the country; but if they will come voluntarily, it will be well.

Ano-

Anonymous.

Case 202.

An ordinary commits administration out of his diocese or province: an ordinary of *Ireland* may commit administration here in *England* of goods within his diocese.

An ordinary of *Ireland* may grant administration of goods in *England*.—Ld. Ray. 562. 856.

The Queen *against* Leech.

Case 203.

LEECH was indicted for a publick nuisance to *Billingsgate-Dock*.

The indictment set forth, that *Billingsgate-Dock* was a common dock, to which all small ships coming with provision to the markets of *London* might come, but that no great ship ought or used to come there; that, notwithstanding, the defendant brought a great ship of three hundred ton into it, *ad commune nocumentum* of all the queen's subjects, &c.

If a man bring a large ship of three hundred tons into *Billingsgate Dock*, he may be indicted for a public nuisance to the dock.

1. Hawk. ch. 75. 2. Hawk. ch. 10. sec. 59. and ch. 25. sec. 35. 61. 12. Mod. 342. 510. 519. 626. 635. 640.

It was excepted, on motion for quashing of this indictment, that it was inconsistent to say that a place is *a common dock*, and that it would be *a nuisance* for a great ship to come there; for a common dock in its nature is free for all ships.

But PER CURIAM, Why may there not be *a common dock* only for small ships, as well as a *common pack* and *horse way*; and if a man with a cart use such a way, so as to plow it, and render it less convenient for riders, will not that be a nuisance indictable? Besides, we never quash indictments for nuisances. But if a nuisance be removed, and the party confess it, it will be a great mitigation of the fine, that is, the removal will; and it may, in that case, be proper to offer affidavits to lessen the offence to the Court, but not otherwise.

And they put the defendant to demur, which he did; *quod nota*.

*[146]

* Williams *against* Jackson.

Case 204.

UPON a point, what notice should be given to defendants of trials, and of executing of *writs of inquiry*, these points were agreed by the Court:

What notice ought to be given of executing writs of inquiry.

FIRST, That convenient notice was as much necessary, and fit to be given, of the executing of *a writ of inquiry*, as of *a trial (a)*.

1. Keb. 132. 1. Sid. 34. 238. 2. Lilly, 151. 356.

2. Salk. 465. 647. 650. Inst. Leg. 64. 143, 4. 293, &c. 8. Mod. 366. Comy. Rep. 35. 11. Mod. 237. 12. Mod. 435. 525. 1. Barnes, 84. 205. 223. 289. 302. 2. Barnes, 203. 237. Ld. Ray. 338. 5. Com. Dig. "Pleader" (Z. 2.). Impey, 400.

(a) Therefore where a Term's notice of *trial* is required, there must, at the same distance of time, be like notice of executing a *writ of inquiry*, Peyton *v.* Burdus, Stra. 1100. And a Term's notice must be given in all cases where the proceedings have been delayed, except by *injunction* out of chancery, for four Terms. Rule Mich. Term, 4. *Ann.*

O 4 SECONDLY,

WILLIAMS *against* JACKSON.

SECONDLY, That by a late rule of Court, if a *writ of inquiry* or issue be to be tried in *London* or *Middlesex*, and the defendant live not above forty miles off, eight days notice will suffice; but if it be above forty miles off, there ought to be fourteen days notice in either case.

THIRDLY, That the reason is the same in all other cases, where the parties are above forty miles distant from the place where the trial is to be, though they be country causes: yet because it is an ancient rule, that *eight days notice* should be sufficient in all *country causes*, and that had been done in the case now in question, it being a country cause, the execution of the *writ of inquiry* stood.

And THE COURT said, They would consider of altering the rule (*a*).

Why fifteen days between teste and return of process.

And PER CURIAM, The reason why by common law there are fifteen days between the *teste* and the return of process, is, because that was thought a sufficient time to come from any part of the kingdom to another, for at twenty miles a-day a man in fifteen days will go all over the land.

1. Salk. 599. 602.

Cro. Eliz. 738. 8. Mod. 31. 305. 10. Mod. 82. 11. Mod. 255. 12. Mod. 524. Skin. 633. 4. Bac. Abr. 422. 2. Bl. Rep. 922. Stra. 811. 2. Ld. Ray. 1528. 6. Com. Dig. "Process" (L). Stra. 765. 917.

(*a*) It does not appear that the rule has been altered. Impey's Pract. 5. edit. 400. Cromp. Pract. 285. Barnes, 203.

Case 205. Sparks *against* Wood.

Pleas to the jurisdiction as well of inferior as superior courts must be verified on oath, and tendered in person while the Court is sitting.

S. C. 3. Salk. 373. 1. Vent. 88. 1. Lev. 333. 1. Raym. 189. 3. Mod. 63. 1. Sid 464. 2. Mod. 197. 2. Inst. 230. 1. Bac. Abr. 561.

DEBT was brought in *London*: A prohibition was moved for, and ruled *nisi*, upon suggestion that the defendant had tendered for plea below, that the cause arose out of their jurisdiction, and offered to make oath of the truth of his plea.

Now it was shewed, that he tendered the plea after the Court was up, whereas it should be *in propriâ personâ*, and in court: and though an affidavit was offered here of the truth of the plea, and one *Turner's Case* quoted out of *Lutwyche* (*b*), where a prohibition had been granted upon such an affidavit here above without oath of it below;

Yet by POWELL, POWYS, and GOULD, *Justice*, *absentè* HOLT, *Chief Justice*, the rule was discharged; for in all pleas that oust a court of jurisdiction, whether inferior or superior, there must be oath in that very court of the truth of the plea (*c*).

Quære, if they refuse the oaths.

(*b*) 2. Lutw. 1023.

(*c*) See 4 and 5. *Ann.* c. 16. and Mr. Gwillim's Edition of Bacon's Abr. vol. i. 26.

Cragg

* Cragg *against* Bowman. Case 206.

At NISI PRIUS, *before* TREVOR, *Chief Justice of the* Common-Pleas.

A FEME COVERT had parted from her husband by consent, who allowed her *separate maintenance*. She came from *Beverley* in *Yorkshire*, where the husband lived, to *London*; where, living in *adultery*, some four years after she became big with child, and in that condition came to lodge with the plaintiff, who did not fully appear to have known any thing of the matter, and lodged and boarded with him for nigh a twelve-month: he was likewise at the charge of her lying-in.

If a *feme covert*, after parting by consent, and receiving a *separate maintenance*, commit *adultery*, her husband shall not be liable to her debts. Ante, 105. Post. 162, &c. 171.

Now the action was brought against the husband for this debt; and all this matter appeared on evidence.

The Chief Justice ordered the plaintiff to be *called*; for he said, that though the husband be bound to pay the wife's debts for her reasonable provision, yet if she part from him, especially by reason of her misbehaviour, as here it must be presumed she did, she living in *adultery* after the separation, and he allows her *a maintenance*, he shall never after be charged with her debts, until a new cohabitation.

Note, Here the woman lived very decently and modestly all the while she was in the plaintiff's house; and also it was proved, that her maintenance was duly paid to her (*a*).

1. Salk. 113. 116. 119. 1. Keb. 96. 337. 482. 1. Mod. 124. 1. Sid. 127. 425. acc. 2. Sid. 209. 1. Lev. 4. 2. Vern. 386. 493. 671. 752. Prec. Chan. 502. 239. 49[illegible]. 11. Mod. 241. 12. Mod. 244. 276. 372. Ld. Ray. 444. 1006. Stra. 127. 647. 706. 875. 1122. 1214. 2. Bl. Rep. 1197.

(*a*) See the case of Robinson *v.* Gosnold, post. 171. Sparrow *v.* Caruthers, 2. Bl. Rep. 197. Hatchett *v.* Baddeley, 2. Bl. Rep. Ringstead *v.* Lanesborough, Co. B. L. 32. Barwell *v.* Brooks, Cook B. L. 36. Corbet *v.* Polnitz, 1. Term Rep. 5.

Popley *against* Ashly. Case 207.

THE defendant being a captain of a ship, took several goods for the use of the ship from the plaintiff, who sent his servant with a bill to him for his money. The defendant orders the servant to write him a receipt for the money, which he did, and thereupon he gives him a note upon a third person, payable in two months. The master sent several times to the third person, to present him the note, but could not get sight of him within the time at which the money was payable: the party breaks.

A draft on a third person given by a vendee to a vendor in payment, will not discharge the debt, if the drawee is not to be found, and the holder use due but ineffectual diligence to get it paid. S. C. Holt, 121. Post. 301.

This action was now brought for the money against the captain; and all this appearing on evidence, and that the captain went to sea next day after he gave the note,

Gilb. E. R. 155. 10. Mod. 109. 12. Mod. 241. 408. 517. Stra. 415. 508. 550. 70 910. 1175. 1195. 1248.

POPLEY *against* ASHLY.

HOLT, *Chief Justice*, directed for the plaintiff. And he said, that if a man give a note upon a third person in payment, and the other take it absolutely as payment (*a*), yet if the drawer knew the third person to be breaking, or in a failing condition, and the receiver of the note uses all reasonable diligence to get payment, but cannot, this is a fraud, and therefore no payment; and here was no laches in the plaintiff; for the party failed before the money was payable, and the captain was gone to sea, so he could not bring him back to him to give him notice: but if a man
* [148] * take a note, and after it is payable makes no demand, and that he might be paid if he had been diligent enough, there if the party, on whom the note is, fails, it is at his peril that took the note (*b*).

(*a*) See Clarke *v.* Mundal, 1. Salk. 124. 3. Salk. 68.

(*b*) By 3. and 4. *Ann.* c. 9. s. 7. If any person accept a bill of exchange for and in satisfaction of any *former debt*, or sum of money formerly due to him, this shall be accounted and esteemed a full and compleat payment of such debt, if such person, accepting of any such bill for his debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, &c." The due course is to demand payment at the time the bill becomes due, or to give notice within a reasonable time to the parties to whom he means to resort for payment, of its not being paid. What shall be a reasonable time was formerly considered as a matter of fact for the opinions of the jury under all the circumstances of each case, Hankey *v.* Trottman, 1. Black. Rep. 1. but it is at length settled that this is a question of law for the decision of the Court, Tindal *v.* Brown, 1. Term Rep. 167. And as to what has been considered *reasonable time* upon this subject, see Taffell *v.* Lewis, 1. Ld. Ray. 744. Blesaid *v.* Hurst, 5. Burr. 2670. Goodall *v.* Dolly, 1. Term Rep. 712. Coleman *v.* Sayer, 2. Stra. 829. Dagliss *v.* Weatherby, 2. Bl. Rep. 747. Tindal *v.* Brown, 1. Term Rep. 170. Metcalf *v.* Hale, cited Dougl. 515. 1. Term Rep. 171.

Case 208. Graves *against* Blanchett.

An action will not lie at common-law for calling an unmarried woman *a whore*, and therefore, if to such a charge in a declaration other words which *are actionable* be joined, and *entire damages* given, the judgment shall be arrested, although the second count alledges *special damage*.

S. C. 2. Salk. 696.

AN action on the case for words: The plaintiff declared for words spoke at several times.

The first were, "She is a whore, and has had a bastard by her "father's apprentice;" alledging *a colloquium*: The other, "Thou "art *a whore*, and hadst *a bastard* by your father's apprentice;" *quorum quidem aliorum verborum propalatione*, &c. such a one who courted her for a wife, and was ready to marry her, fell off: There was a verdict for the plaintiff, and intire damages.

IT WAS MOVED *in arrest of judgment*, that the first words were not actionable, the special damages being tied up to the latter words by the word *aliorum*.

And PER CURIAM, If it were *res nova*, it were reasonable to make the first words actionable, for no greater misfortune can befall a young woman, whose well-doing depends upon her having a good husband, than to be reputed *a whore*; but the authorities are too many and great to run counter to them; and the reason of them is, that fornication is a spiritual offence, not punishable at

Ante, 1. Vent. 4. 1. Sid. 396. Hob. 296. Carth. 498. 10. Mod. 385. 12. Mod. 597. 633. Stra. 666. 936. 946 471 545. Ld. Ray. 710. 1004. 1007.

common

common law; and an action shall not lie for charging one with an offence of which the law takes no notice, without *special damages* (*a*); and if *Anne Davis's Case* (*b*) had been pursued, as it has been contradicted, it would do: There was a time when *hereticks* were put to death, yet it never was actionable to call a man *a heretick* (*c*).

GRAVES *against* BLANCHETT.

And the judgment arrested, viz. *quod quer' nihil' cap'*, &c.

(*a*) See Salter *v.* Browne, Cro.Car.436.
(*b*)
(*c*) See 1. Com. Dig. "Action of Defamation" (F.)

Harvey *against* Broad.

Case 209.

JUDGMENT was given by default in the common-pleas, and a *writ of error* of it there. Upon the general error assigned, it was shewed, that the *writ of inquiry* was returnable *Tres Trinitatis*, which in fact happened to be *Sunday* the fourteenth of *June*.

The writ was returned executed the fourteenth of *June ult. præterit'*, which must be a year before.

PER CURIAM. A writ of inquiry may be executed on the day on which it is returnable, and the *ult' præterit'* is but a mistake, the return being made after the fourteenth day; and the *ult' præterit'* was intended to go to *the day*, and not to *the year*, and therefore you may amend it in common-pleas.

But what is fatal is, that *Tres Trinitatis* is the *Sunday*, and right *essoin-day* of the Term; and though the essoins be kept on *Monday*, yet a writ returnable *Tres Trinitatis*, when that falls on a *Sunday*, though the return be kept on the next day, cannot be executed on the next day.

And therefore the judgment was reversed *nisi* (*a*).

If a writ be returned as executed on the fourteenth of June *last past*, it shall refer to *the day* and not to *the year*.
S. C. post. 159. 196.
S. C. 2. Salk. 626.
S. C. Holt, 762.
Post. 250. 252.

If a *writ of enquiry* be returnable on a *Sunday*, it is void.
11. Mod. 120.
Stra. 811.
Ld. Ray. 1557.
Sellon's Pract. 13.

(*a*) See the Case of Davy *v.* Slater, 1595. 1. Bl. Rep. 496. 526. post 250. Swan *v.* Browne, 3. Burr.

* Cole *against* Turner.

*[149]

Before HOLT, *Chief Justice, at* NISI PRIUS.

Case 210.

HOLT, *Chief Justice*, upon evidence in trespass for assault and battery, declared,

FIRST, That the least touching of another in anger is a battery.

SECONDLY, If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.

To touch another in anger, though in the slightest degree, or under pretence of passing, is, in law, a battery.
S. C. Holt, 108.
Post. 172.

2. Roll. Rep. 545. Carth. 480. 491. 1. Mod. 3. Jones, 444. Ld. Ray. 62. 231. 2. Com. Dig. "Battery" (A.). 1. Hawk. P. C. ch. 62. s. 2. 1. Bac. Abr. 154.

THIRDLY,

COLE *against* TURNER.

THIRDLY, If any of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt, will be a battery (*a*).

An action by husband and wife for a battery on *both*, concluding *ad damnum ipsorum*, is bad.

Ante, 127.

NOTE, It was in action of battery by husband and wife, for a battery upon the husband and wife, *ad damnum ipsorum*; and though the plaintiff had a verdict, yet THE CHIEF JUSTICE said, he should never have judgment.

And the judgment was after arrested above upon that exception.

(*a*) See Year Books 7. *Edw.* 4. pl. 26. the 3. *Hen.* 4. pl. 9. the 22. Assize, pl. 60. and Bro. Abr. "Trespass" 236. 336.

Case 211.

Turner *against* Nurse.

An order or bare commission of chancery is no evidence.

Post. 225. Salk. 278. 281. 286. 555. 8 Mod. 129.

AN ORDER of the court of chancery is not to be given in evidence, without producing a copy of the bill on which it was made (*b*), yet a commission out of chancery to abut and bound certain land, returned and acquiesced under, and an enjoyment accordingly, is good evidence of the land so bounded being rightly bounded; but a bare commission returned without more, is no evidence at all.

341. 8. Mod. 75. 181. 322. 9. Mod. 66. 11. Mod. 210. 12. Mod. 136. 231. 1. Vern. 413. 431. Gilb. E. R. 16. Fitzg. 197. Stra. 162. 481. 545. 920. Ld. Ray. 220. 311. 388. 473. 501. 730. 893. 1093. 1166. 1292.

(*b*) In an action upon a wager, whether a decree of the court of chancery would be reversed on appeal to the house of lords, *a copy* of the reversal is sufficient evidence without producing the *minute-book* itself, and such copy need not be on stamps, Jones *v.* Randall, Cowp. 17.

Case 212.

Anonymous.

The grantee of wreck has, of necessity, a right of way to it, over the land of another.

Ante, 3. Post. 163. Bro. Ab. 60. Noy, 9. Wils. 114. Com. Dig.

PER CURIAM. FIRST, If a man, either by grant or prescription, have a right to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it.

SECONDLY, The very possession of the wreck is in him that has such right before any seizure.

Originally all wrecks were in THE CROWN, and the king has a right to way over any man's ground for his wreck; and the same privilege goes to grantee thereof.

Hale

Hale *against* Clare. Case 213.

A WRIT OF ERROR of a judgment in *the palace-court*, and a variance between *the plaint* and *the declaration*, VIZ. that the plaint was entered at the suit of *C. F.* generally, and the declaration was *C. F.* executor, &c.; so that the plaint was in his own right, and the declaration as executor. This was assigned for error.

If *a plaint* in an inferior court be at the suit of *C. F.* generally, and *the declaration* be at the suit of *C. F. executor*, the *variance*, though fatal before, is cured after verdict.

* PER CURIAM. If this variance had been in a record certified from the court of common-pleas, between *the original* and *the declaration*, where the original is only by way of recital, the party might alledge *diminution*, and have the right original if any certified; but the difference is between inferior and superior courts, for no *diminution* can be alledged of a record removed out of an inferior court, but the Court must take it as they find it at first; and this variance is fatal. The want of *a plaint* in an inferior court, is like the want of *an original* in a superior court, and therefore curable by verdict (*a*). So, if there had been a verdict in this case, the question would be, Whether we would not look upon *a plaint* in another action to amount to the want of a plaint, and so aid it by the verdict (*b*). But it being not after verdict, that matter falls not under consideration.

* [150]

S. C. 1. Salk. 266. Post. 181. 7. Mod. 103. Hob. 130. 135. 264. 282. Cro. Car. 282. 1. Jones, 304.

By THE WHOLE COURT the judgment was reversed.

(*a*) See 18. *Eliz.* c. 14. and Parker *v.* Grigson, Cro. Car. 282. Willis *v.* Woodhouse, Hob. 264. accordant. But Prat *v.* Dixon, Cro. Jac. 108. contra.

(*b*) See Wilson's Case, Hob. 130.

White *against* Bodinam. Case 214.

LESSEE for years brings covenant against the lessor, declaring upon a demise and covenant for *quiet enjoyment*, and assigns for breach, that the lessor entered upon him, and ousted him of the premises.

In covenant for quiet enjoyment, the defendant may plead that he entered "to distrain, absque hoc that he ousted him of the premises" without saying "or any part thereof."

The defendant pleads, that he entered to *distrain for rent arrear*, ABSQUE HOC that he ousted him *de præmissis*.

To which the plaintiff demurs, thinking *the traverse* ill; because if he had ousted him of any parcel of the premises, he had a good cause of action; therefore he should have traversed, ABSQUE HOC that he ousted him of the premises, or any part thereof.

But PER CURIAM, The plea is well enough in this case; for if the plaintiff join issue upon the matter of *the traverse*, and prove *ouster* of any part, the issue will be for him.

S. C. 2. Salk. 629. Carth. 205. 177. 183. 290. 519. Vaugh. 175.

2. Co. 1. 8. Co. 91. 3. Cro. 914. 2. Saund. 177. Yel. 30. 1. Vent. 272. Lat. 105. 1 Lut 317. 323. 1. Inst. 282. Hob. 53. 8. Mod. 318. Comy. 230.

And

WHITE *against* BODINAM.

And THE COURT took a diversity between pleading the *general issue*, as in debt you must plead, *non debet nec aliquam inde parcellam*, and a *special issue* as this is. See the case of *Robsert v. Andrews (a)*, and the case of *Teril v. Dune (b)*.

And JUDGMENT was given for the defendant.

(*a*) Cro. Eliz. 84. the sixth error assigned.

(*b*) Dyer's Rep. 115. b.

Case 215.

The Queen *against* The Duchess of Buccleugh.

If a manor be held by tenure of repairing a highway, the alienee of any part of such manor is liable to the whole charge.

S. C. 7. Mod. 54. 98.
S. C. 1. Salk. 358.
S. C. Holt, 128.
S. C. 2. Ld. Ray. 792. 804.

A TRIAL AT BAR upon an *information* against the *Duchess of Buccleugh, Sir John Bucknall, Lady Anne Franklin*, and others, tenants of lands, now or heretofore part of the manor of *Delemore* in *Hertfordshire*, for suffering a *common bridge* to be ruinous, and out of repair.

These points were resolved by THE WHOLE COURT.

FIRST, If a manor be holden by the service or tenure of repairing a bridge, highway, &c. and part of it be afterwards severed from the manor, yet the charge or service shall run with it; and every one of * the alienees, of ever so small a matter or parcel of the *demesnes* or services, is answerable to the publick for the whole, and are contributory among themselves.

* [151]

Post. 191. 255. 307. 8. Mod. 119. 12. Mod. 13. 198. 409. 1. Hawk. P. C. ch. 77. s. 1. Ld. Ray. 856. 1175. 1249. Stra. 180. 900. Salk. 356. 359.

The alienee of a manor by *knight-service* shall hold by the same tenure.

SECONDLY, If a manor be holden of the king by *knight's-service*, and the lord since or before the statute of *quia emptores* alien part of the demesnes, the alienee shall hold by *knight's-service*.

The alienee of a manor charged with an annuity shall hold it so charged.

THIRDLY, If the lord of a manor grant a rent-charge thereout, and alien part of the *demesnes*, the alienee shall hold it charged with the rent.

The lord of a manor may discharge the vendee of it from repairs.

FOURTHLY, Upon alienations, or severance of parcel of the manor, the lord may agree to discharge the land of the repairs; but that only binds himself, and such as claim under him, and not the publick.

A manor cannot be severed.

FIFTHLY, A manor is an entire thing, and not severable.

Land severed from a manor cannot be re-annexed to it.
1. Salk 186, 187.

SIXTHLY, Lands once severed from a manor, can never after become parcel of it in reality, but it may in reputation; as if lands, part of a manor, be aliened away absolutely, and re-purchased, and an unity of possession for a considerable time after.

SEVENTHLY,

SEVENTHLY, Here a park was parcel of a manor, which none can have but by grant or preſcription. A park muſt be by grant or preſcription. Mar. 201. 224.

NOTE, This whole manor was ſeveral times in THE CROWN as part of the *Duchy of Lancaſter* (*a*). The manor of *Le More* was part of the *Duchy of Lancaſter*.

(*a*) The defendant was *convicted*, S. C. 2. Ld. Ray. 792. but it was afterwards moved in arreſt of judgment, that the information only alledged that the defendant "*Sir John Bucknal* ought to repair "the bridge, for that he now is, and for "ſeveral years laſt paſt was, lord of the "manor, &c." and did not ſhew that he was liable to repair the bridge, by reaſon of *tenure*, or by *preſcription*. And THE WHOLE COURT were of opinion, that the county was of common right bound to repair all public bridges; that the defendant's being lord of the manor was no reaſon that he ſhould repair the bridge, and that ſome particular charge, as *ratione tenuræ*, or by *preſcription*, ought to have been ſhewn. And on this objection the judgment was arreſted. S. C. 2. Ld. Ray. 804. S. C. 7. Mod. 55. See alſo Reg. *v.* Watſon, 2. Ld. Ray. 856

EASTER TERM,

The Third of Queen Anne,

AT

The Sittings

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

THE COURT OF QUEEN'S BENCH.

Clark *against* Dealy. Case 216.

THE PLAINTIFF as executor brought *indebitatus* for money of the testator received after his death to the plaintiff's use, and produced the testator's debtor, who paid it, as a witness: but he was rejected.

In an action by an executor against a person who had received money due to the testator, the *original debtor* is not a competent witness to prove the payment of the money. S. C. Holt, 756. 1. Salk. 27, 28.

HOLT, *Chief Justice*. The plaintiff, by bringing this action, determines the election which he had of suing the original debtor, or the receiver, and allows of the payment; but if he be *non-suited*, the matter is at large again, and he may sue the debtor, and therefore the debtor swears to discharge himself, and by consequence is no witness (*a*).

283. 285, 286, 287.

IT APPEARED ALSO, that another sum of money mentioned in the declaration, was found by the defendant in the testator's room after his death, which he took.

Trover and not *assumpsit* lies by an executor for *money* taken out of testator's room after his death.

And PER HOLT, *Chief Justice*, As to that, the plaintiff mistook his action; for he should have brought *trover*, and not an *indebitatus* for money received to his use.

And the plaintiff was non-suited.

(*a*) But he may be rendered a competent witness by a *release* of the debt. Clarke *v.* Shee, Cowp. 199.

Case 217. * The Queen *against* Chapman, late Mayor of Bath.

A copy from *the crown-office* of the writ and return to a *mandamus* is sufficient evidence against the party on an information for a *false return*.

2. Salk. 428, 429, 430, 431
1. Salk. 77, 78.
Post. 309.
Carth. 170. 293.
Skin. 293 310. 368.
Q. 2. Hawk. ch. 10. sec. 47.
S. C. Holt, 442.
Ld. Ray. 126. 564. 840. 885.
12. Mod. 126. 308. 322. 408.

AN INFORMATION was granted against *Chapman* for making a *false return* to *a mandamus*, commanding him to proceed to the election of A TOWN-CLERK for the corporation, in the room of one *Bushell*.

To which he returned, that before the arrival of the writ, *John Smith* had been duly chosen, and sworn into the said office.

It appeared on evidence, that the right of election was in thirty common-council men; that *the mayor*, at such a time, before the arrival of the writ, had summoned them to meet in order to the election; that twenty-eight met; that three candidates were set up; that two of the twenty-eight voted for one; that thirteen voted for another; and that the mayor and twelve more voted for the third; that the mayor, pretending to have a casting voice, declared his man duly elected; and, at another court, swore him in.

And the following points were in this case ruled by HOLT, *Chief Justice*, at NISI PRIUS.

FIRST, That there needs no more evidence to prove this return to be the mayor's, but the copy of the writ and return thereof in THE CROWN-OFFICE.

A false return by a *majority* shall be intended the *mayor*'s unless he disavow it.

SECONDLY, That though, upon the consultation, the majority be against him, and make a return in his name, yet it shall be taken to be his if he do not come and disavow it.

Cowp. 538. 1. Salk. 431. 701.

The delivery of the writ to the mayor need not be proved.

THIRDLY, That it is not necessary to prove a delivery of the writ to THE MAYOR, no more than to a sheriff in a *false return* against him (*a*).

A *mandamus* to a corporation must be returned to the mayor.

FOURTHLY, That, notwithstanding, the writ is to be delivered to THE MAYOR, as the most visible part of the corporation.

Action for a false return may be against *the corporation* or any *member* of it.

FIFTHLY, That this action for a false return may be brought against the whole corporation, or against any particular member of it.

The mayor of common right has not a casting voice.

SIXTHLY, That THE MAYOR or other head-officer, of common right, has not a casting voice; but that such a thing may be by particular constitution, as by *prescription* or by *charter*.

7. Mod. 12. 12. Mod. 232. 1. Stra. 53. 10. Mod. 56. 5 Mod. 404. 421.

(*a*) So in an action of debt against a sheriff for permitting an escape, the indorsement of *non est inventus* upon the *capias ad satisfaciendum* is sufficient evidence of its having been delivered to him: so the bailiff's name indorsed on the writ is sufficient evidence that he was authorized by the sheriff, without proving the warrant. Bletch v. Archer, Cowper, 63.

SEVENTHLY,

SEVENTHLY, If there be an equality of votes, and therefore they cannot choose, upon *mandamus* they must agree, or else they shall be all brought up as in *contempt*, and laid by the heels until they do agree; for although after a jury is sworn, they shall be impounded until they *all* agree, yet here it suffices that *a majority* do agree.

On a *mandamus* to elect a *town-clerk*, they cannot return that there was an *equality of votes*.

10. Mod. 75. 12. Mod. 232. 2. Burr. 798. to 429.

And THE MAYOR was found guilty.

1019. Cowp. 249. 538. 4. Term Rep. 810. Kyd on Corporations, 1. vol. 401.

*[153]

Case 218.

* Dove *against* Smith.

IN TRESPASS for breaking the plaintiff's close, and treading his grass,

In trespass, the *value* of the damages must be *stated* and *proved*.

It appeared on evidence, that the plaintiff had a close adjoining to the back part of the defendant's house, which was a publick-house; that the defendant sometimes used to set a table for his guests in the said close, and serve them there; and that he often used to walk there for his pleasure, and with others, who shot with bows and arrows there.

Ante, 38. 105. Cro. Jac. 297. 2. Mod. 253. 5. Mod. 178. 2. Lev. 430. 4. Burr. 2455. S. C. Clift. 713. S. C. Holt, 194.

HOLT, *Chief Justice*. You must give evidence of the value of the damages done, or you cannot recover, for the law goes by evidence.

And if in this case the jury give under forty shillings damages, though the title of the land do not come in question, yet will I certify for *costs*, for this is a voluntary malicious trespass, and the statute is only to be understood of small accidental trespasses (*a*).

The statute 8. & 9. *Will.* 3. c. 11. only excludes accidental trespasses from *full costs*. Lutw. 1301. 1304. &c.

And here it being upon a *not guilty*, they could not give any matter of right in evidence, not even in mitigation of damages.

In trespass, the *right* cannot be given in evidence on *not guilty*.

(*a*) By 22. and 23. *Car.* 2. c. 9. "In "trespass and other actions personal, if "the jury find under forty shillings da-"mages, the plaintiff shall have no more "costs than damages, unless the Judge "shall certify that the *freehold* or *title* to "the land came principally into ques-"tion." See Moor *v.* Hale, Bull N. P. 329. Beale *v.* Moor, 2. Stra. 1168. Blunt *v.* Miller, 1. Stra. 645. Lord Dacre *v.* Tibb, 2. Bl. Rep. 1151. Clegg *v.* Molyneux, Dougl. 750. And by 8. and 9 *Will.* 3. c. 11. "In all actions 'of trespass in which the Judge shall 'certify the trespass to be *wilful and 'malicious*, though the damages are un-'der forty shillings, the plaintiff shall 'have full costs." See 3. Black. Com. 214. Espinasse Digest, 424.

EASTER TERM,

The Third of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt.* *Chief Justice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powis, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Esq.* *Attorney General.*
Sir John Hawles, *Knt.* *Solicitor General.*

Anonymous. Case 219.

PER CURIAM. If an attorney be well known, and may be found, it is not sufficient to leave a declaration for him in *the office*, but it ought to be delivered to him; otherwise it suffices to leave it in the office.

A declaratio must be deliver ed to the attor ney if known, otherwise it mu be left at the office.—1. Crompt. 88. Ld. Ray. 1407. 8. Mod. 227. 379. 12. Mod. 217. 23

Anonymous. Case 220.

AN ACTION in this court upon a judgment for damages in the common pleas.

SALKELD, *Serjeant*, now, *before plea*, moved to bring so much into court, and to have it struck out of the declaration.

HOLT, *Chief Justice*. No: you may plead *tender* and *uncore pres*.

But then the Counsel discovered, that the plaintiff below was now become *a bankrupt*, and no commission being out they durst not tender him the money, but would bring it into court, to remain in trust for him that should have right.

In debt on judgment, t defendant ca not pay mon into court bef *plea pleaded*, though t plaintiff is come *bankrup*

7. Mod. 1 2. Salk. 596, 597. Ante, 11. 25. 60. 101.

8. Mod. 236. 242. 305. 379. 10. Mod. 26. 12. Mod. 90. 187. 153. 241. 598. 614. 633. 1. Barn 197. 200. 281. 2. Barnes, 229. 275. 297. Stra. 142. 638. 787. 890. 906. 957. 1027. 1107.

ANONYMOUS.

HOLT, *Chief Juftice.* You are in the right to take care how you pay it voluntarily, but we cannot be truftees for you.

And THE COURT would make no rule.

Cafe 221.

* Rich *againft* Doughty.

An *efcape warrant* granted on the 1. *Anne*, c. 6. muft be executed by *a conftable* or other legal officer; and therefore, although fuch a warrant may be *granted* to *private perfons*, yet if *executed* by them, the party fhall not be committed to the *common gaol*, but to the prifon from whence he efcaped.

S. C. 3. Salk. 149. Ante, 22. 63. 95. 125. Poft. 183. 253. 5. Mod. 8. Hob. 63 12. Mod. 227. 230. Comy. 554. Stra. 99. 491. 423. 3. Com. Dig. "Efcape" (E.). Ld. Ray. 309. 853.

DOUGHTY was a prifoner in THE KING'S BENCH, and having efcaped was taken up on a *Judge's warrant*, purfuant to the ftatute 1. *Anne*, c. 6. by a parcel of people, whereof none was an officer. The act directs, "That if any perfon or perfons "rendered to or charged in cuftody of the marfhal of the *King's* "*Bench* or warden of *the Fleet*, either in execution or on *mefne* "*procefs*, or upon any contempt of the courts at *Weftminfter*, "fhall efcape, it fhall be lawful, upon oath thereof in writing, "made by one or more credible perfon or perfons before any one "of the Judges of that court where fuch action was entered, "or judgment and execution were obtained, &c. for fuch Judge "before whom fuch oath fhall be made as abovefaid, to grant "unto any perfon whatfoever who fhall demand the fame, one or "more warrant or warrants under his hand and feal, therein "reciting the action, execution, or contempt, with which fuch "perfon or perfons fo efcaping ftood charged, directed to all "fheriffs, mayors, bailiffs, conftables, tithingmen, therein "and thereby commanding them, and any of them, in their "refpective counties, cities, towns, and precincts, to feize and "retake fuch perfon or perfons fo efcaped, and fuch perfon or "perfons, fo retaken upon fuch warrant, forthwith to convey and "commit to the *common gaol* of fuch county where fuch perfon or "perfons fo efcaped fhall be retaken, &c. &c."

MOUNTAGUE having difclofed the matter by motion, the fheriff was ordered to return the warrant, which he did thus: "That he was brought to him in cuftody of one *R*, and others to "him unknown, by virtue of the warrant, and that he detained "him in cuftody *juxta exigentiam warranti præd.*"

BROTHERICK urged, that this act, being in aid of the execution of juftice, ought to be favourably extended; and therefore that the prifoner being brought to the fheriff, and delivered to him together with the warrant; and the warrant being directed "To "all fheriffs, mayors, &c" the fheriff at his peril muft now detain him, though the original taking were illegal.

HOLT, *Chief Juftice.* He is brought to the fheriff by a warrant illegally executed, and therefore it is the fame thing as if there had been no warrant at all. Suppofe the fheriff has a warrant for a man, and he is forcibly brought before him by a perfon who has no authority, the fheriff cannot detain him by the warrant, by grafting a legal imprifonment upon an illegal one: if he do, an action of falfe imprifonment will lie againft him. He

cannot

cannot justify receiving any person who is brought to him in illegal custody, for he is not bound to receive him from any body but from *a constable* or other *peace-officer*. Indeed, if he ask the person who brings the prisoner what he is, and the person affirms himself to be *a constable*, *&c.* he must believe him, and make a return accordingly.

Rich *against* Doughty.

And here the return not being filed, they gave him time to amend, which he would not do.

And at another day, the return being filed, THE COURT adjudged it insufficient, and granted a *habeas corpus* to bring the prisoner back to the king's bench prison.

Foxton *against* Mosely.

Case 222.

COVENANT by an apprentice for not teaching him four several trades in an indenture of apprenticeship mentioned.

In covenant, the defendant cannot, without *oyer*, set out the *indenture*, and plead "*covenant performed*."

Ante, 28.

The defendant, instead of craving *oyer* of the plaintiff's indenture, set forth an indenture of his own, and pleaded a performance of the covenants therein contained.

* And, upon demurrer, it was adjudged for the plaintiff; for the defendant cannot shew any other indenture, but must crave *oyer* of the indenture declared on.

* [155]

1. Salk 498.

Dougl. 467. 5. Com. Dig. "Pleader" (P. 1.). Cowp. 56.

Collins *against* Jessot.

Case 223.

KING moved for *a prohibition* to THE SPIRITUAL COURT for libelling there to dissolve a marriage because of *a precontract*.

Previous to the Marriage Act, the spiritual court was not prohibited from proceeding to dissolve a marriage contracted *per verba de præsenti*, or *per verba de futuro*; for, in both cases, the matter was matrimonial, and within the jurisdiction of the court: nor was it necessary for the libel to shew that a dissolution of the contract was the object of the suit.

But the libel did not set forth that it was in order to a dissolution; and therefore the suggestion was, that the libel did not in certainty shew the end of the prosecution, as it was said they ought to do, that the Court here might see whether it was an end proper for them to prosecute for. *F. N. B.* 41. *a.*

HOLT, *Chief Justice*. If a contract be *per verba de præsenti*, it amounts to an *actual marriage*, which the very parties themselves cannot dissolve by release or other mutual agreement; for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ*; with this difference, that if they cohabit before marriage *in facie ecclesiæ*, they are for that punishable by ecclesiastical censures; and if after such contract either of them lies with another, they will punish such offender as an adulterer. And if the contract be *per verba de futuro*, and after either of the parties so contracting, without a previous release or discharge of the contract,

S. C. 3. Salk. 437. S. C. Holt, 458. Post. 172. 5. Co. 51. 3. Lev. 65. 2. Lev. 15. 3. Mod. 165. 5. Mod. 411. Lutw. 68. Cro. Eliz. 79. Co. Lit. 34. Carth. 99. 1. Sid. 13. 2. Com. Dig. "Baron and Feme" (B.). (C.). Stra. 960.

Collins against Jessot.

marry another, it will be a good cause with them of a dissolution of a second marriage, and of decreeing the first contract's being perfected into a marriage.

Quæ omnia tota Cur. concess. except the last point, whereof POWELL, *Justice*, doubted.

Upon which HOLT, *Chief Justice*, added, that it was first resolved in my *Lord Vaughan's* time, that an action would well lie at common law for breach of such an executory contract *per verba de futuro*; which resolution VAUGHAN *totis viribus* opposed, because the party had this remedy in the spiritual court, which was agreed by all. But notwithstanding it was resolved, that the party had his election of either remedy, and that by bringing an action at common law, and that appearing on record, the remedy in the spiritual court was actually released; for now, in lieu of a performance of the contract, he shall recover damages. And he quoted a case which he remembered had been tried at GUILDHALL, which was an action for breach of such a promise, and, upon issue of *non assumpsit*, proof was made of the promise, but the defendant shewing that he had been sued for the same matter in the spiritual court, and producing a sentence against the plaintiff, the plaintiff, notwithstanding this proof, was nonsuited, because that they were the proper judges in the spiritual court whether it were *a pre-*
* [156] *contract* or not. * And if a man and woman make mutual promises of intermarriage *in futuro*, and the man give the woman a hundred pounds in satisfaction of the promise, and she accepts it so, it is a good discharge of the contract (*a*).

Post. 172. 3. Lev. 65. 5. Mod. 411.

And being stirred again at another day:

The ecclesiastical courts have jurisdiction in all matrimonial causes.

PER CURIAM. The spiritual courts have jurisdiction of all matrimonial causes whatsoever: and where it appears to us that the cause is spiritual, of which in consequence they have conuzance, unless it be by reason of some collateral temporal matter in it, we ought not to prohibit them. And it is no reason here to prohibit them because this may be a *future contract* for breach of which an action at law will lie, no more than when they libel for laying violent hands upon a spiritual man, for which an action at law lies for him for the battery, and a suit in the spiritual court for the irreverence to his character (*b*).

2. Inst. 488. 5. Co. 9. Jones, 259. Stra. 1056. B. R. H. 326. 5. Com. Dig. "Prohibition" (G. 15.).

(*a*) But now by THE MARRIAGE ACT, 26. *Geo.* 2. c. 33. s. 13. it is enacted, "That in no case whatsoever " shall any suit or proceeding be had " in any ecclesiastical court in order to " compel a celebration of any marriage " *in facie ecclesiæ*, by reason of any " contract of matrimony whatsoever, " whether *per verba de præsenti* or *per* " *verba de futuro*, any law or usage to the " contrary notwithstanding."

(*b*) See Kelly *v.* Walker, Cro. Eliz. 655.

And by HOLT, *Chief Justice*, There is a great diversity between THE SPIRITUAL COURT and THE COURT OF ADMIRALTY in reference to suggestions for prohibitions; for THE ADMIRALTY has jurisdiction in respect of the locality of the cause of action, let the nature of the action be what it will; and therefore for a prohibition, though they lay the cause to arise *super altum mare*, the party may suggest the contrary to oust them of jurisdiction; but the jurisdiction of the spiritual court is in respect of the nature of the thing, *viz.* whether it be *matrimonial* or *testamentary (a)*; and therefore, if it appear by the libel to be of that nature, we will not prohibit them.

The jurisdiction of THE ADMIRALTY arises from the *locality of the act*; and of THE SPIRITUAL COURT from the *nature of the act*.

Hob. 79. 213. 2. Salk. 553.

POWELL, *Justice*, condemned the diversity in *Fitzherbert (b)*, between a promise to give him ten pounds with his daughter in marriage, and to pay him ten pounds if he married his daughter. Post. 172.

HOLT, *Chief Justice*, said, that by the first was understood ten pounds to be laid down upon the book at the time of marriage, and therefore it was matrimonial.

And the prohibition was denied PER TOTAM CURIAM.

(*a*) For the origin of the jurisdiction of the spiritual court in testamentary matters, see Lambard's Saxon Laws, 64. 111. Bp. Wilkins, 78. Lindwood, 174. Selden Eadm. 168.

(*b*) Fitz. N. B. 107. a.

Smith *against* Bartlett. Case 224.

DEBT UPON A BOND. The late act 8. & 9. *Will.* 3. c. 18. (*a*) of composition of two thirds in number and value of the creditors, was pleaded in bar, averring, that he was indebted to the plaintiff in forty-nine pounds on the seventeenth of *November*, 1697, and did then abscond; a replication; and rejoinder.

A plea under 8. & 9. *Will.* 3. c. 18. must shew that the party was insolvent at the beginning of the sessions. Ante, 58.

* ACHERLY excepted to the declaration, that the absconding ought to be averred on the first of *October*, that being the time on which the session begun, and to which the act, as to this part, relates: and this appears plainly by the word "*have*" in the clause of absconding in the statute, * [157]

Clift. 156. Lut. 266. 271. Comy. Rep. 118.

And judgment was given for the plaintiff.

(*a*) Repealed by 9. & 10. *Will.* 3. c. 29.

Famshaw *against* Morrison. Case 225.

Hilary Term, 3. *Anne*, *Roll* 139.

JUDGMENT was given in the court of common pleas upon *scire facias* on a recognizance by bail, THAT the original plaintiff should have execution upon the recognizance, *et quod*

A judgment in *scire facias* against bail, that the plaintiff "do recover his *damages* sustained by occasion of the delay of execution," is erroneous; for the Court cannot award *damages*, but only *costs of suit.*—S. C. 1. Salk. 208. Post. 159. Carth. 415. Skin. 100. 140. 1. Bac. Abr. 525, 526. Gilb. E. R. 195. 1. Barnes, 306.

recuperet

FAMSHAW *against* MORRISON.

recuperet damna sua, which he had sustained *occasione dilationis executionis*.

The exception taken upon a writ of error was, that the Court had no power to award *damages* for *delay of execution*, but they should give him them for *costs of suit*.

PER CURIAM. *Damages* generally include *costs* (*a*), which word "costs" properly signifies *costs of suit*, and "delay of execution" is properly "damage," *viz.* the being so long out of his money, which the Court used formerly to assess, by allowing the party the lawful interest. So "damages of delay of execution" and "costs of suit" upon the statute (*b*) are very different, and to be assessed by different measures; and the statute gives only *costs of suit* against the bail, &c.

Therefore PER OMNES, this is error.

(*a*) See Ashmore *v.* Ripley, Cro. Jac. 420.

(*b*) By 8. & 9. *Will.* 3. c. 11. s. 3. "In all suits upon any writ or writs of "*scire facias*, the plaintiff obtaining judgment, or any award of execution after "plea pleaded, or demurrer joined "therein, shall likewise recover his *costs* "*of suit*, &c."

Case 226. Rowston *against* Combat.

To *assumpsit* in the king's bench, the defendant cannot plead another *action depending* for the same cause in the common pleas. Post. 103.

INDEBITATUS ASSUMPSIT for goods sold and delivered. The defendant pleads, that he ought not to answer to the said declaration, because there is another action pending *ex eâdem causâ* in the court of common pleas.

PER CURIAM. This is not *a demurrer* to your declaration, or a *plea in bar*, but in *abatement* of the declaration.

And *respondeat ulterius* was awarded (*a*).

12. Mod. 48. 91. 204. 307. Fitzg. 313. Ld. Ray. 1014.

(*a*) For pleas of other action pending in bar or abatement, *vide* 6. Co. 7, 8, &c. Ferrars' Case. 5. Co. 7. b. 32. b. 4. Co. 39, 40. Cro. El. 668. Lat. 193. Mo. 458. 2. Vent 168. 2. Mod. 2. 1. Lut. 41, 42, &c. Hob. 138, 139. See also Carthew, 455, 456. and post. 217, 218. —NOTE *to the former editions.*

*[158]

Case 227. * Gilbert *against* Parker and Others.

In replevin, if the defendant plead that he was *seised* of the place where, and justifies the taking *damage feasant*, the plaintiff may alledge that *he* was seised in fee of a *third part* of the place where, and traverse the *sole seisin* of the defendant.—S. C. 2. Salk. 629. 9. Co. 66. 112. 8. Co. 89. 3. Lev. 104. Lutw. 1177. and 1316. 2. Salk. 580. 583. 5. Com. Dig. "Pleader" (G. 13.).

REPLEVIN for taking the plaintiff's cattle in such a place. The defendant makes *conuzance* as servant to *G. P.* who was seised of the place WHERE in fee, and justifies the taking *damage feasant*.

The plaintiff in bar of the conuzance alledges, that he himself was seised in fee of a third part of a moiety of a fifth part of the place

place WHERE, and justifies putting in his cattle, ABSQUE HOC that the defendant's master was sole seised thereof. GILBERT's *against* PARKER AND OTHERS.

To which there was a demurrer.

BROTHERICK assigned for reason of the demurrer,

FIRST, That the *sole seisin* here is not alledged, and therefore not traversable.

SECONDLY, This plea confesses and avoids our title, and for that too it is not traversable.

He agreed, that whatever is necessarily implied in the making of a title may be traversed; for if it be necessary, the plea will be bad without it be intended; and if it be necessary, and for that intended, it may be traversed as a necessary part of the title: and a conuzance is in nature of a declaration, whereby one makes himself a title to distrain. And here the plaintiff ought to say that we have no seisin at all, or to shew that he has a right to put his cattle there by some title consisting with ours; but now he brings in his own title by way of inducement, so that we cannot traverse. And he offered to shew a diversity between an avowry upon *a title* and conuzance or avowry for *damage feasant*; for if one avow for rent, he must shew his title and tenure in particular (*a*), and there the defendant may traverse any part of what he had set out; but to avow for *damage feasant*, it suffices upon the whole matter that a title appears for him to distrain, though not exactly agreeing with what he set out; for there the plaintiff must shew the taking unjust, by making himself a title, or by utterly destroying the others (*b*).

HOLT, *Chief Justice*. You set out a seisin in fee, and nothing more need be traversed. And here he might have said, that *J. S.* was seised, and derive title under him, ABSQUE HOC that you were seised; or that he was tenant in common with you, ABSQUE HOC that you were seised *modo et formâ*, and it had been well (*c*). In the case of *Cowper v. Temple* (*d*), the defendant justified distress, for that *A.* being seised of the place WHERE surrendered it to him and two more, who died, and conveys to him as survivor, whereby he became sole seised; the plaintiff replies, confessing the surrender to three, the death of two, but that one of them before his death surrendered his share to him, ABSQUE HOC that the defendant was sole seised, and it was adjudged good on demurrer. In trespass, the sole seisin is traversed, though but a seisin in fee generally be alledged (*e*): and where one alledges seisin in himself generally, it will not be enough for another to alledge * himself to be a tenant in common with him, without traversing the *sole seisin*, for it is not a confession and an avoidance. And if here he had replied, that * [159]

(*a*) Post. 223. Carth. 179. 5. Mod. 150.

(*b*) Hob. 72. Moor, 863. Dyer, 280. 2. Vent. 228. Hutt. 120.

(*c*) Hob. 129.

(*d*) Cro. Eliz. 795.

(*e*) See Sir George Sparkes' Case, Winch. 7.

GILBERT *against* PARKER AND OTHERS.

J. S. was seised in fee, and made title under him, ABSQUE HOC that the defendant was seised *modo et formâ*, and upon issue the defendant were found seised of a moiety only, it would be against him; for he avowed as one *sole seised*, when it should have been as tenant in common. And where *Dyer*, 280. is objected, First, The Court were divided upon it; and secondly, there may be a difference between *coparceners* and *jointenants* and *tenants in common*; for the two first are seised *per my et per tout*, but the last have *several seisins*; and here to introduce his traverse he must make himself some title, to enable him to controvert with the defendant. And there is no difference between *an avowry* and *a justification*, as was urged; for in both, if the party set forth a falsity he is bound to maintain it.

Carth. 16. 96. 289. 364. 329. 505.

And so by THE WHOLE COURT judgment was given for the plaintiff *nisi*.

NOTE, As authorities were quoted at the bar 1. *Edw.* 4. *pl.* 9. 37. *Hen.* 6. *pl.* 31. *Br.* "*Traverse*," 142. 21. *Edw.* 4. 65. *b.* 32. *Hen.* 6. 2. *b.* *Keilw.* 27. 1. *Lev.* 78.

BROTHERICK said, that by the Year-Book 1. *Edw.* 4. *pl.* 9. it was agreed, that laying *a seisin* generally in a declaration did not import *a sole seisin*, as it would in a bar, replication, &c.; and that *an avowry* was no more than *a declaration*.

But HOLT, *Chief Justice*, thereupon said that an avowry was a declaration, and more.

Case 228. Parkins *against* Chatherton.

Form of declaring in debt upon recognizance against the bail. Ante, 157. Post. 197.

DEBT upon a recognizance by bail in this court; and the declaration sets forth, that the plaintiff in *Michaelmas Term* obtained judgment against their principal, and that in *Easter Term* before the defendants became bail by recognizance conditioned, &c. *in placito præd.*

1. Roll. Abr. 600. Cro. Jac. 45. 97. 2. Wils. 284. 1. Com. Dig. "Bail" (R. 1.). 3. Com. Dig. "Debt" (A. 3.).

To this it was objected, that it did not alledge that there was any action pending in *Easter Term*.

But PER CURIAM, It is well, and the common form of *scire facias* is so; therefore it will be as well in debt upon the recognizance.

Judgment was given for the plaintiff.

Harvey

Harvey *against* Broad. Case 229.

WRIT OF ENQUIRY was returnable *tres Trinitatis*, which happened to be on *a Sunday*, so that *the essoins* were kept on *the Monday*. The writ is returned to have been executed the fourteenth of *June*, which was the day after the return, VIZ. *Monday*.

If a writ cannot be legally executed on the day of its return, it shall not be executed the next day.

PER TOTAM CURIAM. Without doubt a writ may be executed on the day of its return, yet if that day be such a day as it cannot be legally done on, they * shall not do it the next day. THE KALENDAR is law, of which we, as Judges, must take notice. Such a fault may be assigned for error *ore tenus* at the bar. The distinction in the books that we ought to take notice of *immoveable* but not of *moveable* Feasts is vain, for we know neither one nor the other but by THE ALMANACK; and we are to take notice of the course of the moon *(a)*.

* [160]
S. C. ante, 148.
S. C. post. 196.
S. C. 2. Salk. 626.
S. C. Holt, 761.
Ante, 148.
Post. 196. 250.
Fitzg. 95.
Ld. Ray. 353. 1142. 1557.
6. Com. Dig. "Retorn" (C. 1.).

But at the importunity of HALL, *Serjeant*, they gave time to speak to it upon this point, *viz.* Whether, it not being assigned on record, but only *ore tenus*, the Court were bound to take notice of it (*b*).

(*a*) See ante, 41. 81. Post. 252. 2. Leon. 242.

(*b*) The Court was of opinion, that they were bound to take notice of it, though not assigned for error on the record. S. C. post. 196.—See also 6. Com. Dig. "Temps" (B. 2).

Oates *against* Bromell. Case 230.

DEBT UPON A BOND for performance of an award, *ita quod* it were made and ready to be delivered to the parties, or such of them as should desire it, by such a day: *no award* pleaded, and a parol award set out, and avers, that it was ready to be delivered to the said parties: and a demurrer;

If a bond of arbitration be conditioned "so as "it be made "and ready to "be delivered "to the parties "on or before "such a day," the arbitrators may make *a parol award*; for such an award is capable of being *delivered*, and the words do not necessarily import that it must be *in writing*.

For, by BROTHERICK, the words "ready to be delivered" necessarily import, that the award was to have been in *writing*: and he quoted the case *Wood v. Ardist* (*a*) in the common pleas, in *Trinity Term*, in the first year of the reign of *Queen Anne*, in the very point; and insisted much upon *Hungate's Case (b)*, where the condition of the performance was, *ita quod arbit. fiat et deliberetur utriq. partium*, there being two defendants, and held, that a delivery to one of them was insufficient, yet, if it could be a parol award, a publication of it to both would be sufficient.

SALKELD *contra*. "Parol" may be delivered as well as "writing;" as, in common parlance, "to deliver a message," "to deliver

S. C. post. 176.

S. C. 1. Salk. 75. S. C. Holt, 82. Ante, 82. 1. Salk. 69. Cro. Jac. 541. Ld. Ray. 115. 247. 535. 1141. 1076. 1. Barnes, 41. 1. Com. Dig. "Arbitrament" (E. 5.). (I. 6.). 3. Viner Abr. 286. 1. Bac. Abr. 148, 149.

(*a*)

(*b*) 5. Co. 103.

"himself

OATES against BROMELL.

" himself well," when a man expresses his thoughts gracefully, " Delivery" is to be understood *secundum subjectam materiam*; if it be of a writing, it must be a manual; if of a parol matter, it must be an oral delivery; and he relied on the case of *Cocks v. Macclefield (a)* as full in the point, and the case of *Capell v. Rogers (b)*, and said, that *Bendloe's* report of *Cocks v. Macclefield (c)*, which seems to differ from *Dyer*, is a very obscure report of the case.

HOLT, *Chief Justice*. There are two distinct things to be done: FIRST, The making, and, SECONDLY, To be ready to be delivered. If it had been, "*so as* the said award be ready to be " delivered," it might be well. If it were in writing, it would suffice to say that it was made; for what is made in writing, then is ready to be delivered, because then it is deliverable. But the question is, Whether *a parol award* be properly deliverable, or whether we shall not understand the meaning of the words " ready to be delivered" to be a delivery in writing? And he and THE COURT seemed clear it should be so understood.

But another day HOLT, *Chief Justice*, having seen the case above of *Cocks v. Macclefield* in *Dyer*, and the record of it in *Coke's Entries*, said, they were very strong authorities for the plaintiff, and that the award might have been made behind the
[161] parties backs, and delivered, *viz.* pronounced over * again to their faces; and if so, what may be delivered may be ready to be delivered; and that the case, as it is reported in *Bendloe*, had neither head nor tail to it.

POWELL, *Justice*. If the words had been only, " SO AS it be " made and delivered," I would take delivery to be only to give the parties notice of the award; but " ready to be delivered," I think, must be a delivery in writing; and if issue were taken upon the readiness of delivery, how should it be tried?

HOLT, *Chief Justice*. If it were *res nova*, I should be apt to think so too; but when I find so clear an authority in the case, and some reason for it, I cannot depart from it.

And so said GOULD, *Justice*.

But they would be well informed of the case quoted lately in the common pleas, and no rule was given (*d*).

(*a*) Dyer, 218. pl. 5. S. C. Co. Ent. 126.
(*b*) 3. Bulst. 311.
(*c*) Bendloe, 97.

(*d*) This case was argued again, S. C. post. 176. and the Court, on considera-tion, gave judgment for the plaintiff. S. C. 1. Salk. 75.

EASTER TERM,

The Third Year of Queen Anne,

AT

The Sittings

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

THE COURT OF QUEEN'S BENCH.

---

* Holmes *against* Hall. Case 231.

INDEBITATUS ASSUMPSIT by an executor for so much money of the testator received by the defendant to the use of the executor.

The evidence was, that some writings of the testator came to the defendant's hands, which he would not deliver up to the executor, who, to get the writings, gave him so much money, whereupon he promised to give up the writings, but afterwards refused.

DARNELL, *Serjeant*, objected, that the plaintiff had mistaken his action; for he should have brought an action on the case upon the special agreement for non-delivery of the writings.

HOLT, *Chief Justice*. If *A.* give money to *B.* to pay *C.* upon ~~C.'s~~ giving writings, &c. and *C.* will not do it, an *indebitatus* will lie for *A.* against *B.* for so much money received to his use; and many such actions have been maintained for *earnests* in bargains when the bargainor would not perform, and for *premiums* for insurance when the ship, &c. did not go the voyage (*a*). But it has been held, that it will not lie for money paid upon a *usurious contract*, because there it is not intended that it should be repaid, or anything done for it. Indeed, these cases of *indebitatus* for

If an executor give a person a sum of money on his promising to deliver up certain writings then in his possession belonging to the testator, and he afterwards refuses to perform his promise, the executor may recover back the money so paid by *indebitatus assumpsit.*

S. C. Holt, 36. Post. 309. 1. Salk. 24. 28. 12. Mod. 650. Ld. Ray. 1413. 1. Bac. Abr. 167.

(*a*) See 1. Show. 156. 1. Salk. 22. Skin. 412. Park on Insurances, 397, 398.

money

HOLMES against HALL.

money received to use have been carried too far, and no body would more willingly check them than I would. Therefore it shall be saved you if you will, but I will not nonsuit the plaintiff.

But it appeared on the evidence, that the defendant pretended to the money as due from the testator, and would not deliver the writings without payment, and that the money was given in satisfaction of the debt.

So it was clear against the plaintiff, and he was nonsuited.

[162] * And DARNELL quoted a case, where, he said, one had undertaken to obtain a pardon for another, and to that end got several sums of money from him, but had not got the pardon, and an *indebitatus* for money to the plaintiff's use was brought, and yet the plaintiff had been nonsuited before HOLT, *Chief Justice*.

Which HOLT, *Chief Justice*, utterly denied.

Case 232. Langford *against* Administratrix of Tyler.

If husband and wife cohabit, he is liable to her contracts, though she deals as a *separate trader*.

S.C. 1. Salk. 113. S.C. Holt, 96. Skinner, 349. Ante, 105. 147. Post. 230. 2. Vern. 118. 10. Mod. 6. 11. Mod. 253. 12. Mod. 603. Gilb. E. R. 83. Ld. Ray. 444. 1006. 1248.

THE DEFENDANT, now administratrix to *Tyler* her late husband, in his life-time used to deal in tea, and sold four butts of tea to the plaintiff at so much a pound. The plaintiff took one away, paying for it, and fifty shillings over, to go towards payment of the rest. When she came for the rest, the vendor would not stand to her agreement.

An action was brought, and two counts, one upon *the agreement*, and the other an *indebitatus* for fifty shillings received to the plaintiff's use.

These points were ruled by HOLT, *Chief Justice*.

FIRST, If a husband and wife cohabit, and the wife deal separately, her contracts shall charge the husband, for cohabitation is sufficient evidence of notice.

Goods sold must be paid for on delivery, though *earnest* was given, unless they were sold on *credit*.

SECONDLY, If a bargain be made, and earnest given, without an express agreement that payment is to be made at a certain time, the money must be paid before the goods be removed (*a*).

The delivery of goods bought cannot be demanded without a tender of payment.

THIRDLY, A demand of the goods without a tender of the money is void, because it is not pursuant to the intent of the bargain, and the earnest is only to bind the bargain.

(*a*) By 29. *Car.* 2. c. 3. f. 17. " No " contract for the sale of any goods, for " the price of ten pounds sterling or up- " wards, shall be allowed to be good, " except the buyer shall accept part of " the goods so sold, and actually receive " the same, or give something in earnest " to bind the bargain, or in part payment, " or that some note or memorandum " in writing of the said bargain be made " and signed by the parties to be charged " by such contract, or their agents law- " fully authorized."

FOURTHLY,

Fourthly, After earneſt given, the vendor cannot ſell to another (a); but if the vendee do not come to pay and take the goods, the vendor ought to come and requeſt him to come and pay; and if he do not come in convenient time, the agreement is diſſolved, and then he may ſell.

If goods be ſold and earneſt received, the vendor cannot ſell to another, unleſs the vendee refuſes to take them.

(a) If a vendor ſell goods by ſample, to be delivered to the vendee within a month, and take earneſt, and within a month ſend them by his ſervant to the premiſes, and when part are unloaded the reſt are diſtrained for toll, the delivery is complete, ſo as to intitle the vendee to bring treſpaſs for the ſeizure. Blakey v. Dinſdale, Cowp. 664.

EASTER TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Esq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

More *against* Rowbothom. Case 233.

SEVERAL part-owners of a ship, some whereof were against freighting her.

By a course in THE ADMIRALTY in such case, for advancing of navigation, THEY DECREE, that the majority shall prevail and freight, they giving the dissenting party *caution* for their parts of the ship against all risques; which was done here. The ship being lost, those who gave the *caution* were libelled against, and sentence was given in THE ADMIRALTY.

And now *a prohibition* was moved for, suggesting, that the *caution* was given upon land, and that all matter of property is to be ordered by the common law only.

And THE COURT seemed strong, that they had such a power; and if so, by consequence they have no jurisdiction over the *caution* as incident thereunto.

Part owners of a ship, dissenting from the voyage, may arrest the ship in THE ADMIRALTY, and oblige the assenting owners to give *caution*.
S. C. 6. Viner, 515. c. 20.
Ante, 12. 26. 79.
Hob. 79.
Carth. 26. 166, 518.
1. Show. 14, 15.
Hard. 473.
Skin. 230.
2 Chan. Caf. 36. Fitzg. 197. 2. Stra. 890. Ld. Ray. 223. 235. 984. 1289.

More against Rowbothom.

Yet it being matter of consequence, and never yet determined, they granted *a prohibition*, and directed them to declare according to their suggestion forthwith *(a)*.

A prohibition shall go *after sentence* for want of jurisdiction.

And though it be after sentence, yet if they had no jurisdiction, a prohibition ought to go.

And so it was ruled.

2. Burr. 813. Cowp. 422. 424. 1. Term Rep. 3. 552. 2. Term Rep. 473. 6. Com. Dig. "Prohibition" (D.).

(*a*) It was settled in the case of Dimmock *v.* Chandler, Hilary Term, 4. *Geo.* 2. that where there are several part owners of a ship, and one or more of them fits her out for a voyage, the rest of the owners may sue process out of THE COURT OF ADMIRALTY to arrest the ship, and compel the owners engaged in the outfit to give in *security* there to answer to *them* their several proportions of the freight, and the value of their respective shares in the ship, in case she should be lost in the voyage. Fitzg. 197. S. C. 2. Stra. 890.—And this case has been since recognized as law, Ouston *v.* Hebden, 1. Wils. 101.; Blacket *v.* Annesley, 1. Ld. Ray. 235.; Menetone *v.* Gibbons, 3. Term Rep. 267.; Smart *v.* Wolf, 3. Term Rep. 323.

*[163]

Case 234. * The Queen *against* The Inhabitants of Cluworth.

The Court will not fine a defendant convicted of not repairing a way, until it be certified whether it is or is not repaired.

THE INHABITANTS of the parish of *Cluworth* were indicted for not repairing a common footway, and submitted by pleading *guilty*.

But THE COURT, before they would set a fine, would be certified by some of the justices of the peace of the neighbourhood that the way was sufficiently repaired; which they did.

S. C. 1. Salk. 358. 3. Com. Dig. "Chimin" (D. 6).

A *distringas* shall go, on non-repair of a way, although the offender has been fined.

PER CURIAM. If one be found *not guilty* upon an indictment for not repairing a highway, he is quit for being fined; but a *distringas in infinitum* shall go to the sheriff against him till he certify that the way is repaired.

Persons using navigable rivers have a *right of path* on its banks.

And by HOLT, *Chief Justice*, If one have land adjoining on a *navigable river*, every one that uses that river has, if occasion be, a right to a way by the brink of the water over that land, or farther in if necessary.

Ante, 3. 149. 3. Com. Dig. "Chimin" (D. 4.).—But see the case of Ball *v.* Herbert, 3. Term Rep. 253. that the public are not intitled at the *common law* to tow on the banks of ancient navigable rivers; the right must be founded either on *statute* or on *usage*.

A person bound to repair a way need not make it better than it was.

If a man be bound by prescription to repair a way, he is not bound to put it into better repair than it has been in time out of mind before.

S. C. 1. Salk. 358. Ante, 3. 149. Jones, 296. Ld. Ray. 725. 858. 1169. Sayer, 93. Dougl. 719.

Sexton's Case.

Case 235.

AN ADMINISTRATRIX owing money to *A.* as such, but nothing in her own right, was arrested by him by a writ, without naming her administratrix; and she being thus under arrest, gave a warrant of attorney to confess judgment: whereupon judgment was entered, and her goods taken in execution.

And all this appearing by THE MASTER's report, though there had been an attorney bye at the executing of the warrant of attorney, the judgment was set aside for irregularity, and restitution awarded; for she was in custody without any foundation, and under that terror gave the warrant. PER CURIAM.

A *warrant* of *attorney* given by an *administratrix* for a debt due by the intestate under an arrest as for his own debt is void. Ante, 85. 1. Salk. 399, 400. 7. Mod. 115. 139. Cowp. 141. 281.

The Queen *against* The Inhabitants of Newnham Murrey.

Case 236.

AN ORDER OF JUSTICES was, "WHEREAS complaint has "been made to us by the churchwardens, &c. of *A.* that *B.* "came to settle in such a parish contrary to law, therefore they "ordered him to another place."

And it was quashed, for want of an adjudication that he was likely to become chargeable.

An order of removal must adjudge, that the pauper was *likely to become* chargeable. Ante, 87, 88. Post. 213. 287.

2. Salk. 478, 479. 491. Carthew, 28. 222. 365. 396. 516, &c. Stra. 142. 393. 698. 2. Bott P. L.

*[164]

The Queen *against* Gold.

Case 237.

GOLD was indicted, for that one *A.* a poor boy being set out to him as *an apprentice*, pursuant to the statute 5. *Eliz.* c. 4. he *vi et armis* refused to provide for him.

It was moved to quash it:

FIRST, * Because it was not a matter indictable.

SECONDLY, In case it be indictable, there should have been first an application to a justice of peace, and after an appeal to the sessions, and then perhaps for disobedience to such orders an indictment would lie.

THIRDLY, It is laid to have been *vi et armis*, which is absurd, it being for a nonfeasance.

PER CURIAM. If this had been the case of a *common apprentice*, an indictment would not lie *(a)*. Indeed formerly it has been held generally, and by all the Judges in *Pyne's Case (b)*, that the justices could not compel a man to take an apprentice upon the statute 43. *Eliz.* c. 2.; but since the contrary opinion has pre-

An indictment lies for *disobeying an order* of justices in not receiving and providing for a poor apprentice, pursuant to 43. *Eliz.* c. 2.; but being a *non-feasance*, it ought not to be laid *vi et armis*. S. C. 1. Salk. 381. S. C. Sett. & Rem. 133. 1. Salk. 66. 68. Post. 164. 12. Mod. 27. Ld. Ray. 1369. Stra. 1268. 2. Burr. 799. 832.

(*a*) See Rex *v.* Trevilian, 2. Stra. 1268. (*b*) 3. Keb. 628. 686. 854.

 vailed,

THE QUEEN *against* GOLD.

1. Salk. 491.
1. Sid. 99.
1. Salk. 67.
1. Lev. 84.
Ray. 65.

vailed (*a*). And then when we allow them such power, of necessary consequence we must allow an indictment for *disobedience to their orders* (*b*), either in not receiving, or receiving and after turning off, or not providing for such apprentice. And though an act of parliament prescribe an easier way of proceeding by complaint, as is urged, yet that does not hinder an indictment (*c*). And though the *vi et armis* in this case be absurd, yet it is only *surplusage*, which will not vitiate.

And THE COURT refused to quash it.

(*a*) The King *v.* Fairfax, 3. Mod. 270. S. C. 1. Show. 76.—See also Rex *v.* Cross, Comb. 289.; Rex *v.* Fleet, Cald. 31.; Rex *v.* Clapp, 3. Term Rep. 197.; Rex *v.* Tunstead Happing, 3. Term Rep. 523.; Rex *v.* St. Nicholas, Nottingham, 2. Term Rep. 726.

(*b*) See Rex *v.* Balme, Cowp. 648.

(*c*) The 8. & 9. *Will.* 3. c. 30. enacts, that when any poor children shall be appointed to be bound apprentices, pursuant to the 43. *Eliz.* c. 2. s. 5. the person or persons to whom they are so appointed to be bound, *shall receive* and provide for them according to the indenture, signed and confirmed by the two justices of the peace, and also execute the other part of the said indentures: and if he or she shall refuse to do so, oath being made thereof by one of the churchwardens or overseers of the poor, before any two justices of the peace for that county, &c. he or she shall forfeit for every such offence the sum of TEN POUNDS.—See also 32. *Geo.* 3. c. 57.

Case 238. Caly *against* Hardy, Golson, and other Justices of the Peace of the Town of Ipswich.

If a forcible entry be committed, and all the *justices of the corporation* refuse to enquire of the force, it may be made by the *justices of the county*.

S. C. ante, 139.
S. C. Holt, 407. 12. Mod. 403. Stra. 1154. 1173. 1222.

THE MAGISTRATES of the town of *Ipswich* had a mind to turn the *clerk of the market* out of his place, and procured a *forcible entry* to be made upon THE MARKET-HOUSE to get the possession thereof from him; and the justices of the town being, as was suggested, in the faction, would not inquire of the force.

HOLT, *Chief Justice.* If all the justices of a corporation are concerned in a force, and will not enquire of it, the next justices of the county shall do it; for the denying to do it is a forfeiture of their exemption from the county.

A MANDAMUS directed to all the justices of a corporation *jointly and severally* to enquire of a forcible entry.— S. C. ante, 139.

And here a *mandamus* was granted jointly and severally to all the justices of the town to inquire of the force, for THE COURT would suppose them all guilty.

Case 239. The Queen *against* Tutchin.

If a person surrender on a proclamation to the secretary of state, on a charge of misdemeanor, the secretary may bind him to appear in the king's bench, but not to his good behaviour.—S. C. post. 268. S. C. 1. Salk. 51. S. C. Holt, 424. S. C. 5. St. Tr. 532. S. C. 2. Ld. Ray. 1061. Post. 268. 1. Salk. 48. 2. Salk. 699. 5. St. Tr. 544.

TUTCHIN was the author of a seditious paper called "THE "OBSERVATOR," and an order of the house of commons against him for apprehending him, and likewise A PROCLAMA-

TION,

TION, with a reward for taking him up; but he absconded a long time, but did not desist from writing on, very scandalously, against the Government. And now at last he * surrendered himself to THE SECRETARY OF STATE, who bound him to appear here the last day of this Term, and to his *good behaviour* in the mean time.

THE QUEEN *against* TUTCHIN.

An information being now filed against him, he, by his Counsel, prayed *time to plead* till next Term.

PER CURIAM. If he had been summoned, and had not appeared, but had been brought in upon the *capias*, he must have pleaded *instanter*; but appearing upon his recognizance, he ought to have convenient time: and now he must renew his recognizance here, that is, give new bail, or the same, if good, may enter into a new recognizance; and though we do record his appearance now, and give him leave to go look for bail, yet if he do not come sitting the Court, we may call him, and record his default: and we cannot well bind him to his *good behaviour*; for it is not usual, when we proceed in order to convict a man, to bind him to his good behaviour in the *interim*.

If a person surrender to an information for a misdemeanor, he may, on removing his recognizance, have *time to plead*; but if he is brought in on *a capias*, he must plead *instanter*.

Gawdy *against* Pickersdale. Case 240.

ERROR OF A JUDGMENT against an executor in *Rippon Court*.

An *inferior court* may amend errors of fact in the record by the minute-book.

The verdict gave the plaintiff three pounds damages, one shilling costs, and five pounds ten shillings *de incremento*: and judgment *quod quer. præd. summas attingent.* to seven pounds, &c. *de bonis testatoris, ac si de bonis propriis* of the defendant.

Hob. 128. 1. Salk. 47. 52. Carth. 157. 2. Lev. 22. Cowp. 407. 1. Term Rep. 783.

PER CURIAM. We will not suffer them to amend any error in knowledge or skill by their books of minutes; yet we will allow amendments of errors in fact in the record by the minute-book, if it appear upon examination to have been originally right in the book, and not made for that purpose.

And HOLT, *Chief Justice*, remembered the case of *Sanderson v. Lemiare* (*a*), where in error on a judgment in the *court of Northampton* they would not suffer them to amend *præceptum fuit* into *præceptum est*; yet in the same case there were but eleven jurymen named in the record, there being twelve in the book, they suffered them to amend that.

(*a*) 3. Salk. 31.

EASTER TERM,

The Third Year of Queen Anne,

A T

The Sittings

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

THE COURT OF QUEEN'S BENCH.

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*[166]

The Warden and Company of Sadlers of London *against* Jones. Case 241.

THE COMPANY OF SADLERS brought debt upon the statute of 1. *Jac.* 1. c. 22. s. 44. against the defendant, for that being *a sadler*, he did make five hundred saddles insufficiently and unsubstantially, *contra formam statuti*, and so became indebted to them in the forfeiture.

If a statute declare "that the "skins of sheep, "being tanned "or tawed, and "every salt hide, "shall be reputed and "taken to be "*leather*," and there are two kinds of tawing, one dry, which leaves the fur on, and the other wet, by a preparation of salt and allum, a sheepskin prepared with white allum is *leather* within the meaning of the act.

Upon evidence the case was thus:

* The *King of Portugal's* envoy residing here, directed the defendant to make him five hundred saddles for war, for the use of the king his master, after the pattern of a saddle brought for that purpose from *Portugal*, the seat whereof was covered with goat-skin, and stuffed on the outside with straw. The defendant made some twenty saddles in imitation of the pattern, but covered the seat with white allumed sheep skins, and instead of straw stuffed them with hay on the outside. The Company finding this matter applied to *the envoy*, informing him of the cheat put upon him; who thereupon countermanded the defendant for some time, until he had examined and compared his work with the pattern, and after ordered him to go on, which he did. The saddles were all made, as aforesaid, paid for, and sent to *Portugal*.

This action was now brought for the penalty.

THE

THE WARDEN AND COMPANY OF SADLERS OF LONDON *against* JONES.

THE FIRST QUESTION was, Whether "allumed sheep-skins" were "leather" within the act? And it appears by sect. 49. that it is "if tanned or tawed." And it appearing by evidence that there are two sorts of tawing, one dry, which leaves the fur on, the other wet, which is done with salt and allum, it was clear, sheep skins allumed were leather within the act.

If a statute enact, "that "whosoever "shall not "make the "wares be- "longing to "sadlery suffi- "ciently and "substantially "shall be liable "to a penal- "ty," and describe the manner in which the leather shall be made, a sadler who uses leather not dressed according to the statute is not liable to the penalty, if the buyer is satisfied with the commodity.

THE NEXT QUESTION was, Whether it were proper for the use that it was put to by the defendant? and if not, Whether employing it improperly would bring the defendant within the words, "not substantially and sufficiently made up?"

HOLT, *Chief Justice*, as to this said, that if the jury would think it improper for that use, he would have the rest found specially; for all these words (as it was urged) were only applicable to the making up and workmanship, without regard to the materials, that being provided for by other clauses of the statute, a sadler, he said, who has bought good leather according to the statute, and suffered it to rot, and after worked it up into saddles, &c. would be dissatisfied by that construction.

SECONDLY, He said, that the meaning of the statute was to prevent people's being cheated by having ill goods put upon them; and if this kind of sheep-skins was not according to the statute, yet if the buyer knew it, and were satisfied therewith, it would be no crime; for the statute did not design to take away any man's liberty of using what he pleased, that is, buying and contracting for what he pleased.

But THE JURY found for the defendant generally.

Freemen of a Company disfranchised are competent witnesses.

NOTE, In this case three of the Company were disfranchised to be legal evidence, they declaring upon a *voir dire* that they had no assurance of being received again.

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Case 242.

* Neal *against* Goulston.

Debt upon a bond not specified in taxation according to late act. Post. 184.

DEBT UPON A BOND conditioned for payment of money, and therefore to be specified in taxation according to the late act of parliament.

By HOLT, *Chief Justice*, upon evidence. If *the certificate* produced bear date in due time, I will not doubt but that it was then delivered, or now, that it bears but a very late date; yet if you prove that it was taxed in due time, it will suffice; or, lastly, if it has not been taxed in due time, yet if you have *a tally* to produce that you have paid the double tax for the penalty, it will do.

And the plaintiff failing in all was nonsuited.

And here HOLT, *Chief Justice*, put the case, where an obligee had been beyond sea all the time; but resolved nothing as to that.

Osbourne *against* Hosier. Case 243.

DEBT was brought upon a single bill for payment of two hundred and thirty pounds on demand. *Comparison of hands is good evidence to prove the attestation of a bond.*

Upon *non est factum* pleaded, one of the subscribing witnesses was produced, and gave full evidence of the ensealing and delivery of the bond. S. C. Holt, 194.

On the other side was produced a person of the same name and surname with the other subscribing witness; who acknowledged, that the hand was very like his, but that it was not his; that he never knew either of the parties, nor the other witness, nor could the other witness say that he was the man; and both their reputations being made good in proof,

HOLT, *Chief Justice*, ordered them both to write their names, and thereupon left it to the jury, who found for the plaintiff.

And here HOLT, *Chief Justice*, ruled, that this being a single bill, it needed no specification according to the late statute, because it did not carry interest, yet directed the jury to give damages, *viz.* interest. In debt on a single bill payable on demand, *interest* may be given in *damages.*—5. Com. Dig. "Obligation" (C.).

And where it was objected, that it was payable on *demand*, and that no damages or interest incurred till demand, and none was proved; Want of demand must be specially pleaded. Ante, 85. Post. 184.

HOLT, *Chief Justice*, said, that could not have been taken advantage of upon "*non est factum*," or any other collateral issue, but should have been pleaded.

(*a*) But see the case of Swire *v.* Bell, 5. Term Rep. 371.

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The Queen *against* Carter. Case 244.

CARTER was indicted for a wilful and corrupt perjury; and the indictment, reciting THE RECORD of the trial at which it was supposed the perjury was committed, being a feigned issue out of chancery, set forth, that there happened a discourse between my *Lord Wharton** and *Sir W. R. R. S. R. R.* and *J. S.* concerning the boundary of certain lands; and my *Lord Wharton* affirmed *A.* to be a boundary; the said *Sir W. R. R. S.* and *J. S.* affirmed, that *A.* was not the boundary. Whereupon a wager was laid, and mutual promises were made between the *Lord Wharton* and them the said *Sir W. R. R. S. R. R.* and *J. S.*

And now at the trial of the indictment this variance was assigned between *the record* they took upon them to recite, and *the indictment,*

If an indictment for perjury, in reciting the record of the trial, state a fact as happening between *A. B.* and *C.* and it appears from the record produced in evidence that the fact happened between *A.* and *B.* only, *the variance* is fatal.—S. C. Holt, 347. 5. Mod. 343. 349. 4. Burr. 2269. 2. Hawk. P. C. ch. 69. f. 22. 1. Salk. 374. 2. Salk. 514. 1. Sid. 106. 237. 377. 454. 1. Ven. 182. 370. Hob. 55. & *quære* Hob. 59. Faresl. 101. 1. Sid. 148. 153. 217. Raym. 74. 1. Keb. 531. 2. Salk. 660. 10. Mod. 194. 12. Mod. 139. 511. Ld. Ray. 257. 887. 1221. Comy. 43. Stra. 921. 1230. 1. Peer. Wms. 568. 3. Peer. Wms. 196. 244. 311.

THE QUEEN against CARTER.

ment, that the affirmation that *A.* was not a boundary was in *the record* laid to have been by *Sir W. R. R. S. R. R.* and *J. S.* whereas *the indictment* laid it to have been by *Sir W. R. R. S.* and *J. S.* omitting *R. R.*; so this record now produced in the court was not the record described in the indictment.

And this seemed a good exception: for by HOLT, *Chief Justice*, If you bring an *assumpsit* against two, and give evidence only of an *assumpsit* by one, you are gone.

"*Barnep*" for "*Barnup*," and "*orientati*" instead of "*orientali*," are fatal variances between an indictment for perjury and *the record* of the trial.

ANOTHER VARIANCE was, that in one of the denominations of lands in the record it was *Barnup*, and in the indictment *Barnep (a)*.

Another word in the record was *orientati*, and in the indictment *orientali*.

And all these being in the description of the record seemed fatal.

In perjury, if the record of the trial be not entered up, it cannot be proved by the minutes.

But ANOTHER FAULT yet grosser was, that the record of the trial at which the perjury was alledged was not entered up; so it did not appear that ever there was a trial.

HOLT, *Chief Justice*, denied the minutes of it for evidence, and quoted a case where a rank perjury had gone unpunished for ever for that omission; for that he said was final, so as the party could never be tried thereon again.

An acquittal for a defect in the indictment cannot be pleaded in bar to a second indictment for the same offence.

But in this case he said, that by reason of the other exceptions, the indictment being insufficient, they might indict him anew; for an acquittal upon a bad indictment would not be a plea to a good one (*b*); whereas if the indictment had been good, an acquittal upon the last fault had been peremptory (*c*). And here the indictment being brought to trial by the defendant, if he have made it up variant from what it is upon THE PLEA ROLL, an acquittal upon it will be void.

Recognizance forfeited by not trying the cause.

And besides, the defendant has forfeited his recognizance, whereby he was obliged to bring down the indictment to trial.

If there be two indictments against a defendant for perjury, and *he* takes the records down to trial, he may bring on which of them he pleases first; but the attorney-general may enter a *nolle prosequi*, and so force him to bring on the other; but a defendant cannot in such case *withdraw* one of them. 4. Com. Dig. "Indictment" (M.).

And whereas here were two indictments against the defendant, and he had brought them down both, and put them into court, he now, to bring which he pleased on first, withdrew one of them.

HOLT, *Chief Justice*, ordered him to put it in again.

And it was insisted on, that the queen had her election to bring on which of her causes she pleased, and therefore they would bring that on first which the defendant would have come on last.

(*a*) See Williams *v.* Ogle, Stra. 889.
(*b*) See Rex *v.* Burridge, 3. Peer. Wms. 439.
(*c*) Rex *v.* Fenwick, 1. Sid. 153.

But

The Queen against Carter.

Holt, *Chief Justice.* It is true, the queen has that election where she brings on her causes herself, but here the defendant brings it on, and he is to do the first act, and therefore has his election; but if you will enter a *non pros.* upon that which they desire to bring on, you thereby inforce them to bring on the other. But to oust all * controversy, the defendant having put in that which he would prefer first, it was first called. * [169]

A mistaking of the record in which perjury is assigned, is fatal.

Note, Another exception was, that the record of the original trial began, "Memorand. *quod apud* W. *coram domina regina* "*et* Johanne Holt, *Milite, Capitali Justic. &c. et sociis suis,* "*&c.*" whereas there is no court so styled, but it ought to be *coram domina regina* only.

Muriel *against* Tracy, Jenkins, Chamberlain, and Cornwaill.

Case 245.

If a declaration for a malicious prosecution charge three persons, one of whom was the justice of the peace, with a conspiracy illegally to arrest and imprison the plaintiff, the *conspiracy* may be collected by the jury from the *circumstances* of the case; but if it appear that the justice of the peace was persuaded by the others that it was not a bailable offence, and that from *ignorance of the law,* and not from malice of his heart, he committed the plaintiff, he shall be acquitted.

S. C. ante, 30. S. C. post. 178. S. C. 3. Salk. 192. S. C. Holt, 706. Ante, 90. 100. Post. 185.

An action upon the case in the nature of *a conspiracy*, wherein the plaintiff declared, that the defendants, *per conspirationem inter eos habitam* to vex and oppress him, did, *praetextu cujusdam warranti* from Sir Simon Lovell, *Recorder of London*, wherein the plaintiff was charged by the oath of one *Ashby* to have assaulted the said *Ashby* on the highway, with intent to rob and murder him, arrest him the plaintiff, and carry him before *Chamberlain*, a justice of peace, who, *ex persuasione* of *Tracy*, refused to bail him, though good bail were tendered, and so *Chamberlain* committed him to the prison of the Gatehouse, where such and such sums of money were extorted from him. But it was not said in the whole declaration that it was without probable cause.

Upon evidence before Holt, *Chief Justice*, it appeared,

That eight years ago *Muriel*, being a gentleman's servant, and riding one day abroad, had fallen out with *Ashby* on the road, and, being in drink, was soundly beat by him; notwithstanding which, *Ashby* took out immediately a justice's warrant against *Muriel* for an assault and battery, but nothing more was done upon it. Six years afterwards, some difference arising between *Muriel*, *Tracy*, and *Jenkins*, here in *London*, *Jenkins* goes down to *Suffolk*, and, at the persuasion of *Cornwaill*, prevail with *Ashby* to come up to *London*, to make the oath abovementioned against *Muriel*, which he did before the Recorder (whereupon the warrant was granted), and had a guinea from *Jenkins* for his pains. A twelvemonth after, *Tracy*, being himself a justice of peace, employed the under-keeper of the Gatehouse, and others, to take up *Muriel*, and to carry him before *Justice Chamberlain*, and send him word as soon as they took him, which accordingly was done. And *Tracy* informed *Chamberlain* that he had advised with the Recorder and other lawyers about the offence charged upon *Muriel*, and that

1. Salk. 14, 15. 5. Mod. 349. 4-5. 1 Saund. 128. 2, 3. 4 Co. 14, 15. 5. Co. 56, 57. 2. Mod. 306. Carth. 417. Skinner, 44. S. Mod. 45. Ld. Ray. 81. 378.

they

Mehrill against Tracy, Jenkins, Chamberlain, and Cornwaill.

they were of opinion it was not bailable; whereas in truth he never did ask the question: whereupon *Chamberlain* refused bail and committed him. *Tracy* followed him to gaol, and directed the gaoler to use him severely, and to iron him.

Holt, *Chief Justice*, As to *Chamberlain*, he was to blame for his *ignorance*, but there is no reason to find him *guilty* upon this evidence (*a*): but for the rest, the circumstances of the evidence shew it to be all one chain of malice; and if the declaration were good, the evidence would maintain it.

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* But the exceptions taken to the declaration were:

If a declaration for a malicious arrest state the warrant to be, "with intent to rob," and the warrant was, "with intent, &c. *as he believes*," the *variance* is immaterial.

First, That it recited a warrant variant from that on which the plaintiff was arrested; for the recital is absolute and positive that the oath was, that the plaintiff had assaulted *Ashby* with intent to rob and kill him; but the warrant was with intent to rob and kill him, *as he believes*.

No great heed was had to that objection; but Holt, *Chief Justice*, said, it should be saved to them.

A declaration for malicious prosecution, stating that the plaintiff was arrested "by *pretence* of a certain warrant," is good.

Secondly, That the declaration supposed the arrest to be without a legal warrant; for it was, that *prætextu cujusdam warranti*, and *prætextu* was the same as *colore*, and that must be taken as if no warrant had been.

But that was over-ruled; for there being an ill use made of this warrant, though it were legal, sure that were *prætextu* of a warrant.

A declaration for malicious prosecution, omitting to state that it was without *probable cause*, is bad.

Thirdly, If it be taken to be a legal warrant, there can be no conspiracy in taking up one by a legal warrant, especially it not being laid that the warrant was taken out without *probable cause*.

1. Vent. 86.

Holt, *Chief Justice*, upon this exception, willed them to withdraw a juror, for he held the declaration ill for not alledging it to have been without *probable cause*.

And to this the parties consented.

In an action of conspiracy, *one* may be found guilty, and the other acquitted.—N. B. 277. A. 278. K. 2. Saund. 230. 1. Vent. 12. 18. 23. *et lib.* Ante, 15. Cro. Car. 239. 3 Mod. 220. Stra. 144. 193. 1227. 1. Wils. 210. 5. Mod. 408. Bull. N. P. 14. 1. Hawk. P. C. ch. 72. s. 8.

Note, Here, by Holt, *Chief Justice*, This being an action on the case in nature of a conspiracy, all might be acquitted to one, and he found guilty.

(*a*) For cases in which the Court has refused to grant *informations* against justices of the peace for ignorance, *vide* Rex *v.* Young, 1. Burr. 556.; Rex *v.* Cox, 2. Burr. 785.; Rex *v.* Palmer, 3. Burr. 1162.; Rex *v.* Jackson, 1. Term Rep. 653.; Rex *v.* Holland, 1. Term Rep. 692.—But if a party be injured by their mistake or ignorance of the law, an action lies, 2. Hawk P. C. ch. 15. s. 13. Green *v.* Bucclechurch, 1. Leon. 323. They cannot however be punished both *criminally* and *civilly* for the same offence, Rex *v.* Fielding, 1. Burr. 719.

Oliver

Oliver against Vernon. Case 24[illegible]

TROVER for fourteen *lemon-trees*, and the statute of Limitations pleaded.

Trover will lie for trees planted in boxes in a garden.

S. C. Holt, 332. Ld. Ray. 276.

On evidence at *nisi prius*, before HOLT, *Chief Justice*, it appeared, that the plaintiff obtained leave from my *Lord Brudenell* above six years before to have the trees stand in his garden at *Twickenham*, and that his lordship's gardener might take care of them; that afterwards *my Lord* sold his garden, with all his trees therein, to my *Lord Portland*, who afterwards sold the garden, and whatever he had from my *Lord Brudenell*, to the defendant, and that a demand and refusal within six years was proved upon the defendant.

IT WAS OBJECTED, that the gardener, who received the trees first from the plaintiff, and continued gardener all along, and looked after and reared the trees, could not be a witness; for that he, in case he proved a title in the plaintiff, would thereby intitle himself to an action for his labour and skill employed in rearing up the trees; whereas if it went for the defendant, he was to have nothing.

If a person desire another to let his servant take care of goods, the servant is a good witness for the plaintiff in trover against his master's assignees.

But this was over-ruled by HOLT, *Chief Justice*,

FIRST, Because if the gardener took care of them as my *Lord Brudenell*'s servant, he was to have nothing for his pains from the defendant.

SECONDLY, If *my Lord* only gave the gardener leave to do it for the plaintiff, the gardener then was so far the plaintiff's servant, and it * never was doubted but a servant was a good witness for his master. *[171]

HE ALSO HELD, that these trees being in boxes, and separate from the freehold, could not pass by the grant of *the garden*, nor by the words "all his trees therein," for they were not his trees, that is, my *Lord Brudenell's*. Nay, it would be hard to comprehend them by construction within the grant, if the words had been "all the trees in the garden," without there were a schedule of the trees intended to pass, and the plaintiff's trees mentioned therein.

Trees in a garden do not pass by a grant of the garden in which they stand.

But HE AGREED, if they had been conveyed by my *Lord Brudenell's* grant, that had been *a conversion*, and being above six years, the issue would be against the plaintiff.

And besides that, the grant of *the garden* was a determination of *the licence* given to the plaintiff, and that the grantee might distrain the trees *damage feasant*; but he having not done so, but suffered them to continue, was so far from *a conversion*, that it was evidence of *a licence* by him.

If *A.* license *B.* to put trees in his garden, and then sells the garden to *D.* and *D.* continue the trees without seizure, it is a renewal of the licence.

And he said, that by grant of "all a man's trees," *apple-trees* would not pass. *Q.*

And the plaintiff had a verdict.

Carter, 218. Cro. Jac. 204.

Case 247. Robison *against* Gosnold.

A husband is liable for *necessaries* furnished to his wife during her cohabitation with him; or if he turns her out of doors; or if he receive her back after separation; but if she leave him, and live separate, and the person has notice of the separation, he is not liable.

S. C. 1. Salk. 119.
S. C. Holt, 103.
Ante, 147.
1. Salk. 116. 118.
2. Lev. 4. 47.
1. Vent. 42.
2. Vent. 155.
1. Keb. 69. 80. 87. 206. 337. 361, &c. 1. Sid. 109. 425. 1. Bac. Abr. 295. 11. Mod. 241. 12. Mod. 244. 372. 603. Gilb. E. R. 152. Stra. 647. 706. 875. 1214. 1222. Ld. Ray. 444. 1006.

A HUSBAND discovering his wife to be a very lewd woman, goes away from her, and she, after having lived several years with AN ADULTERER, was received into the plaintiff's house, who entertained her as the husband's wife.

This action, being an *indebitatus assumpsit*, was brought against the husband for lodging and dieting the wife.

HOLT, *Chief Justice*, at *nisi prius*, held, that let the woman be ever so vicious, yet, while she will cohabit with the husband, he is bound to provide *necessaries* for her, and is liable to the actions of such persons as furnish her with them, for his bargain was to take her for better for worse. In like manner it is if the husband turn his wife away for her wickedness, he remains still chargeable for her necessaries. But if the wife leave her husband, they that trust her after it is notorious that she has left him do it at their peril, and shall not thereupon charge the husband (*a*).

And he seemed to be of opinion, that if a wife had run away from her husband, and contracted debts, and afterwards the husband received her, or came after her, and laid with her but for a night, that would make him liable to the debts. Like the case where a wife elopes with an adulterer, though she thereby forfeits her *dower*, yet if the husband will of his own accord receive her again, she shall have her dower again (*b*).

(*a*) *Sed quære*, unless the wife have *a separate maintenance*. See Sparrow *v.* Caruther, 2. Bl. Rep. 197.; Hatchet *v.* Baddeley, 2. Bl. Rep. 1195.; Ringstead *v.* Lanesborough, Cooke's B. L. 3d edit. 32.; Barwell *v.* Brooks, Cooke's B. L. 36.; Corbet *v.* Polnitz, 1. Term Rep. 5.

(*b*) See the case of Manly *v.* Scott, 1. Mod. 124. and the cases cited in the note at the end of that case.

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Case 248. * The Queen *against* Cotesworth.

Spitting in the face is a battery.
S. C. post. 180.
S. C. 3 Salk. 191. Ante, 149. 2. Keb. 545. 1. Mod. 3. Trem. 270. Carth. 280. 491. 1. Bac. Abr. 154.

THE INDICTMENT was for a battery upon *Doctor R.* The evidence was, that the defendant spit in his face.

HOLT, *Chief Justice.* It is a battery.

"*Son assault*" may be given in evidence on an indictment.
1. Bac. Abr. 155, 156.

HOLT, *Chief Justice.* Though one cannot justify a battery by *son assault demesne*, by pleading it to an indictment, yet he may give it in evidence upon a *not guilty*, and he may be thereupon acquitted.

Hutton *against* Mansell.

Case 249.

An action on a promise of marriage may be maintained, without proving an *express promise* on the part of the woman.

S. C. 3. Salk. 16. 64.
S. C. Holt, 458.
1. Salk. 24.
2 Salk. 437, 438. 553.
Ante, 156.
3 Lev. 65.
5. Mod. 411.
Stra. 938.
Ld. Ray. 386.
12. Mod. 214.
1. Bac. Ab. 168.

AN ACTION ON THE CASE was brought, laying mutual promises of marriage between the plaintiff and the defendant, and a breach in the man, who was in this case the defendant.

Upon evidence, an express promise was proved upon the man, but none on the woman's side.

HOLT, *Chief Justice.* If there be an express promise by the man, and it appear that the woman countenanced it, and by her actions at that time behaved herself so as if she agreed to the matter, though there be no actual promise, yet that shall be sufficient evidence of a promise on her side. And he remembered a case in which he had been a Counsel in the time of MONTAGU, *Chief Baron*, where it had been so ruled upon evidence against his client; and being dissatisfied then therewith, he put the case to eminent men of those times, who all concurred in opinion with THE CHIEF BARON (*a*).

(*a*) See the case of Harrison *v.* Cage and his Wife, Carth. 467. S. C. 5. Mod. 411. S. C. 1. Salk. 24.

TRINITY TERM.

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Esq. Knt. Attorney General.*
Simon Harcourt, *Esq. Solicitor General.*

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* Genner *against* Sparks.

Case 250.

GENNER was a bailiff, and having a warrant for *Sparks* came to his house, and finding him in the yard, told him that he had a warrant for him, and pronounced the word *arrest*, but did not lay his hands on him: whereupon *Sparks* snatched up a pitchfork, and kept off the bailiff, threatening to kill him if he came nigher; and thus retreated into his house, and shut the door against the bailiff. Upon all this appearing on affidavit,

An *arrest* must be by corporal seizing or *touching* the defendant's body; and therefore if a bailiff only pronounce words of arrest, and shew his warrant, and the defendant escape, the Court will not grant an attachment for a *rescue*; for he was not legally arrested.

CONYERS moved for *an attachment* upon the matter against *Sparks*, supposing this to be *a rescous*, or at least a great *contempt* of the queen's writ.

But PER TOTAM CURIAM, Here was no *arrest*, the bailiff having not laid hands on the defendant; for his shewing the warrant, and pronouncing the word "*arrest*," without touching him, was no more an arrest than it would be one if a bailiff sees a man look out at a window, a pair of stairs or two high, and tells him he has a writ for him, and says, that he *arrests* him; and therefore in such cases the bailiff cannot break the house to come at the person, as he could lawfully do if he had been his prisoner, and had escaped into a house from him.

S. C. 1. Salk. 79. Ante, 90. 141. Post. 210. 1. Mod. 56. 7. Mod. 8. 3. Bl. Com. 288.

But

A bailiff, after an arrest, may break open doors to seize his prisoner. Post. 211.

But IT WAS AGREED, that if here he had but touched the defendant even with the end of his finger, it had been *an arrest*, and he might have broke the house afterwards to seize upon him (*a*); and *an attachment* might go for *the rescous*; as if a bailiff have a warrant against a person who is in a house, and lay hand upon

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* him through the window (*b*), he may afterwards break the house to come to him.

Skin. 8. Salk. 79. 1. Hale, 459. Ld. Ray. 1028. Foster, 319. Cowp. 3. 2. Hawk. P. C. ch. 14. f. 9. 2. H. Bl. Rep. 120.

A sheriff's officer is protected by the law in the due execution of his duty.

Dougl. 359, 360. 3. Term Rep. 735.

IT WAS LIKEWISE AGREED, that the bailiff had the protection of the law; and therefore if he had ventured on here, and had been killed by the defendant, it had been murder in him (*c*); or if the defendant had beat or hurt him, he might have his action (*d*); or in this case, if the defendant were within reach of the bailiff when he pointed the pitchfork at him, he might have his action of assault against him (*e*); so if he had presented a gun at him at such a distance as the shot would reach him.

And PER CURIAM, the motion was denied.

(*a*) But a bailiff in execution on *mesne process* may break open the door of a lodger's apartment if he has first gained a peaceable entrance at the outer door of the house. Lee *v.* Gansel, Cowp. 1.

(*b*) 2. Roll. Rep. 138. Palm. 53.

(*c*) See 5. Co. 93. 1. Hale 458. 2. Hale, 117. 470. Ld. Raym. 1028. Foster C. L. 311. 319. and 1. Hawk. P. C. ch. 31. f. 58.

(*d*)

(*e*) See 1. Hawk. P. C. ch. 62. f. 1.

Case 251. Barnaby *against* Sanderson.

If the want of an *original* be assigned for error, and the defendant appears and alledges *diminution*, and, upon a *certiorari* granted, a *variant original* be certified, yet he may, at the day given, suggest *a right original* of another Term, and have another writ of *certiorari* thereon; but there must be previous notice to the plaintiff of the suggestion, and the new *certiorari* must be *filed* in the office, or the proceedings will be irregular.—S. C. 1. Salk. 266. S. C. Holt, 275. 1. Salk. 264. 266. Post. 206. 235. Ante, 113. Skin. 419. to 422. 1. Salk. 144. to 151.

ERROR ON A JUDGMENT in the common pleas, and the want of an original assigned for error.

The defendant comes in *ad audiendum errores*, *gratis*; alledges diminution; and has a *certiorari*. Whereupon *a variant original* is certified; at the day given he comes again, and suggests *a right original* of such a Term, and prays a new *certiorari* to certify that, and pleads "*in nullo est erratum.*"

All this fact appeared on the report of the master.

HOLT, *Chief Justice.* The defendant is right in point of law; for suppose the record below be of *Easter Term*, and after judgment a writ of error is brought here, and the want of original, or variance in the original, be assigned for error, and the defendant alledges *diminution*, the *certiorari* there is only to the *custos brevium* to certify an original of *Easter Term*, VIZ. the Term of which the *placita* are; and if he either certify that there is none, or certify a wrong original, the defendant in error, before *in nullo est erratum* pleaded, may suggest that there is an original of another Term, VIZ. of *Hilary*, *Michaelmas*, or other Term;

and

and there shall go two *certiorari's*; one to the *custos brevium* to certify that original, and another to *the Chief Justice* to certify an entry of the continuances: and this has been carried further; for if the *custos brevium* return a wrong original, or a variant one on the first *certiorari*, of the Term of which the *placita* are, he may suggest that there is a right original even of that very Term, and have a new *certiorari*; and when both originals are before the Court, they will intend that to be the right original which agrees with the declaration. BARNARD against SANDERSON.

To which all the rest agreed.

But because, in point of practice, there ought to have been *notice* to the plaintiff of this suggestion, and the new *certiorari* ought to have been filed in the office, which was not done here, so that the judgment by that irregularity was affirmed sooner than otherwise it could have been, THE COURT discharged the rule for affirmance of the judgment, and directed the defendant to proceed regularly.

So he was forced to move to have it read as a record again, and have it made *a consilium* for to come regularly on.

And the judgment was afterwards affirmed PER TOTAM CURIAM.

*[175]

* The Queen *against* Crisp.

Case 252.

CRISP was indicted, for that there being an account stated between him and *A.* whereby he was indebted, in such a sum, to *A.* which account he signed, he got it into his hand *per falsas et sinistras insinuationes*, and *vi et armis* tore it, *contra pacem*, &c.

An indictment lies for tearing an account after it is signed and settled.

EYRES moved to quash it:

FIRST, Because it was a *private offence*, not indictable.

SECONDLY, Because the indictment did not shew whose the property of the paper was.

Comb. 16. 12. Mod 413. 255. 454. 502. 4. Com. Dig. "Indictment". (D.). Stra. 595. Ld. Ray. 366.

But THE COURT denied the motion; for it is *a trespass* now *ab initio*. The property is his, who was intitled to the debt on the account. And they bid him try it, or demur to it at his peril (*a*).

(*a*) But it seems now to be settled, that an indictment will not lie for a *bare trespass*, Rex *v.* Johnson, 1. Wils. 325. Sayer, 27. for the words *vi et armis* alone are not sufficient, Rex *v.* Storr, 3. Burr. 1698.; Rex *v.* Atkins, 3. Burr. 1706.; there must be such an actual force as implies a *breach of the peace* to make *a trespass* an indictable offence, Rex *v.* Bake, 3. Burr. 1731.; and this degree of actual force must appear on the face of the indictment, Dougl. 153.

Case 253. **Anonymous.**

When a bill may be filed against AN ATTORNEY. Ante, 106.

PER CURIAM. One may file *a bill* against AN ATTORNEY any day within the Term; and if there be *four days* of the Term to come, one may serve rules upon it that Term: but if the declaration be in *Easter Vacation (a)*, which is indeed a declaration of *Easter Term*, the defendant shall have *four days* in *Trinity Term* to plead.

2. Salk. 544. 8. Mod. 43. 11. Mod. 2. 12. Mod. 504. Stra. 522, 523. 532. 1192. Tidd, 242. Dougl. 312.

Abatement must be pleaded within *four days* of the expiration of the Term in which the declaration is delivered.—2. Salk. 515. 517. 519. 1. Salk. 1. Lut. 24.

And one is not confined to *four days* to plead in *abatement*, but he has the whole Term of which the declaration is delivered; but if he has *four days* in the Term of which the declaration is, he shall not plead in abatement the next Term *(b)*.

(*a*) See Dodsworth *v.* Bowen, 5. Term Rep. 325.; Waghorn *v.* Fields, 5. Term Rep. 173.

(*b*) A plea in abatement must be pleaded before *the rule for pleading* is out, 1. Term Rep. 278. Imp. Pract. 239.; which rule expires in *four days*, Gilb. Rep. 318. after declaration delivered in Term-time, Rule, Trin. Term, 1. *Geo.* 2. 2. Stra. 1192.; and these four days allowed for pleading in abatement are both *inclusive*, Jennings *v.* Webb, 1. Term Rep. 277.; and if the last of the four days happen on *a Sunday*, the plea must be filed on the preceding day, Lee *v.* Carlton, 3. Term Rep. 642.; for if it be filed on the succeeding day the plaintiff may sign judgment, Harbord *v.* Pengal, 5. Term Rep. 210.; and the necessity of a rule to plead is superseded by the defendant's pleading in abatement, Brandon *v.* Payne, 1. Term Rep. 689. If, however, a declaration be delivered in Vacation-time, or within less than four days of the end of a Term, the defendant, after *a special imparlance*, may plead in abatement within the first four days inclusive of the next Term as *of the preceding Term*, 1. Bac. Abr. 8vo edit. 27.; but such a plea can only be received in such case after a special imparlance, Doughty *v.* Lascelles, 4. Term Rep. 520.; and it must be *filed* within the four days, for *the delivery* of it only within that time is not sufficient, Imp. K. B. 240.—And by 4. & 5 *Anne*, c. 16. "No *dilatory plea* shall be received, "except the party offering such plea do "by affidavit prove the truth thereof, or "shew some probable cause to the Court "to induce them to believe that the fact "of such plea is true."—See 5. Com. Dig. "Pleader" (D.).

Case 254. **Croket's Case.**

In *assumpsit*, if the declaration be delivered of *Easter Term*, the Court will not in *Trinity Term* change the *venue* from *Staffordshire* to *London*, upon the common affidavit, without the *usual affidavit* of the time when the declaration was delivered.

ASSUMPSIT. The *venue* was laid in *Staffordshire*, and the declaration was of *Easter Term*.

CHETHAM moved to change *the venue* into *London* upon the *common affidavit*; but had no affidavit, as the usual course is, of the time of which the declaration was delivered.

HOLT, *Chief Justice*. The reason of that course is, because if the action were laid in *London* or *Middlesex*, perhaps, by the rules of the court, the plaintiff would have a plea to enter; and therefore it is necessary to satisfy the Court that the declaration was not delivered so long ago as that the plaintiff could be intitled to a plea to enter, to obtain the change of *the venue*: but this being a country cause, and the declaration of *Easter Term*, in which case,

S. C. 2. Salk 669. Stra 211. 1. Com. Dig. "Action" (N. 13.).

though

though it were delivered the first day of the Term, he could not have a plea to enter, he thought this out of the reason of the rule, and therefore an affidavit unnecessary. CROZET'S CASE.

But here, because if the action were laid in *London*, there must be fifteen days between the *teste* and the return of process, and so the plaintiff could have no trial till *Michaelmas Term*,

THE COURT held him up to the rule.

* [176]

Case 255.

* Oates *against* Bromhill.

Easter Term, 3. Anne, Roll .

On a submission to arbitration, "so as the award be made, and ready to be delivered, &c." a *parol award* is good.

S. C. ante, 160. S. C. 1. Salk. 75. S. C. Holt, 8a. Ld. Ray. 115. 247. 533.

THE CASE coming on in *the paper* this Term, BROTHERICK insisted very much, that the words of the condition in the submission, "so AS the said award be made, and ready to be "delivered, and given up to the said parties, or such of them as "should desire it," were of some use, and put in for some purpose, and must be intended of another delivery than the bare pronouncing of the award: and yet if, according to *Dyer* (*a*), "ready to be "delivered" be only to be pronounced or declared by an oral delivery, the adding those words in the condition would signify nothing; for then, as soon as it is made by the arbitrators, it is ready to be declared or pronounced by them; and he insisted on the case of *Wood v. Ardist*, in the common pleas, in *Trinity Term*, in the first year of *Queen Anne* (*b*), where the condition of the submission was in the very same words as here, and a *parol award* set out as here, and adjudged on demurrer to be ill PER TOTAM CURIAM, notwithstanding the case in *Dyer* had been urged; the report of which case he had from *Tracy*, one of the Judges of the court, and THE ROLL whereof he had perused.

But PER TOTAM CURIAM, Upon great consideration, notwithstanding the said late case in the common pleas, a *parol award* is capable of a delivery, *viz.* a declaration of it to the parties, or either of them, if they desire it; and that being so, as soon as the arbitrators have agreed on the award, it is ready to be delivered; and the readiness of delivery needed not to have been averred, because the alledging an award made imports it: nor is the condition in the submission therefore vain; for if, after the award made, the parties, or either of them, had come and asked the arbitrators what award they had made, and they had refused to tell, then he might plead that it was not ready to be delivered, shewing that matter: so perhaps, if the arbitrators had died in so short a time after the award made that the party could not have had convenient time to ask them; for the intent of the condition was, that the parties should have notice of the award.

(*a*) Dyer, 218. (*b*)

Averment that an award was ready to be delivered is good, without saying to both parties.

ANOTHER MATTER he insisted on was, that *the averment* was, that "the award was ready to be delivered to them both," without saying, "and either of them;" for it may be, the arbitrators were ready to declare it to both of them if they had come together, but not to one of them.

2. Com. Dig. "Arbitrament" (E. 6.). Ld. Ray. 115. 247. 535.

PER CURIAM. It is not essential to a *parol award* that it should be notified to both parties.

An award ordering "the said *A.* to pay "to the said *B.* "the said sum "of 10l." is good, though no sum of 10l. was mentioned before.

HE ALSO OBJECTED, that in the award set out it was ordered, that "*præfat. A.* (for the purpose), one of the parties, *solveret* "*præfat. B.* the other party, *præd. summam* of ten pounds," and there was no sum of ten pounds mentioned before.

IT WAS AGREED, that "*præd.*" could not, without a tautology, be applied to *Bromhill* the party, because of the word "*præfat.*" before given him; yet because in sense it could not be applied to *summam*, there being no *sum* mentioned before, THEY ALL AGREED, that they would make a comma after *præd.* and so join

* [177] it to *the party*, * rather than suffer it to go to *summam* to vitiate the award; and where a *præd.* may refer in good sense to either of two antecedents, there it may vitiate, because of incertainty; but where it has but one thing to refer to, and joining it to that would make it nonsense, it shall be rejected as idle.

Vide 2. Vent. 242. 3. Bulst. 311.

And BY THE WHOLE COURT, judgment was given for the plaintiff.

Case 256.

Fazakerly *against* Baldoe.

On a return to a habeas corpus, grounded on a custom of London, the Court will first order the return to be filed, for the purpose of controverting the custom in an action for a false return.

UPON a return of a *habeas corpus* from *London*, a bye-law was set forth, laying a certain penalty upon any freeman that should sell goods usually sold by weight, not having weighed them by THE CITY BEAM (*a*), grounded upon such a custom in *London*.

PARKER and EYRE now moved to have the return filed, for that, without it was filed, the defendant could not bring an action of *false return*, and then there would be no way to controvert the being of such a custom; so they might return what custom they pleased, *falsè et impunè*.

A procedendo may be granted to the mayor's court of London after the return to a habeas corpus (brought by a person committed for non-payment of a penalty under a bye-law of the city) has been filed in the superior court, although the usual practice is, to award the procedendo without filing the writ.— S. C. 1. Salk. 352. S. C. Holt, 322. 335. Ld. Ray. 498.

And as to the objection, that after the return filed there could not be *a procedendo*, they answered,

FIRST, That true it is, a record once filed in that court shall never be sent back; but that is to be understood in another Term, but in the same Term it comes in it may (*b*).

(*a*) See Cudden *v.* Provost, ante, 123. (*b*) 1. Lev. 93. 1. Roll. Rep. 85.

SECONDLY,

FAZAKERLEY *against* BALDOM.

SECONDLY, Though it were true, that a record once filed here could not be sent back the same Term, yet, this being a return of a *habeas corpus*, which removes not the record, nor any of the proceedings below, but only certifies a history or tenor of the record, the filing thereof cannot hinder the Court from awarding a *procedendo* to enable them to proceed below *(a)*. And if the plaintiff would proceed here above, he must begin *de novo* with a new bill against him *in custodiâ mareschalli (b)*.

HOLT, *Chief Justice*. The practice has always been in this court to award a *procedendo* without filing the return. But the question is, Whether the filing the return will be a hindrance to our granting a *procedendo?* It is true, that by *habeas corpus* all proceedings below are suspended until the Court has determined of the right of the cause of detainer upon the return; and if they had proceeded below in the mean time it would be all void, and *coram non judice*; so that it will be necessary to award a *procedendo* to untie their hands below: but why we may not grant a *procedendo* after the return filed I cannot see; for there is a difference in this respect between a *habeas corpus* and a *certiorari*: upon a *habeas corpus* we have not THE RECORD itself here as we have upon a *certiorari*: and where a record is removed hither, and filed here, it shall never be sent back, not even in the same Term, in any case whatever, except in the case of *felony*; and that by the statute of 6. *Hen.* 8. c. 6. whereby if one remove * his indictment for felony up hither, we may remand him back after it is filed, to the county where it is to be tried by the Judges of gaol delivery there. If we grant a *habeas corpus* to bring up a prisoner charged criminally from NEWGATE, and the return is filed, yet, if we adjudge the return good, we remand the prisoner; and the jurisdiction of the Judges of gaol delivery, which is suspended by the *habeas corpus*, is revived by the remanding him back. But upon a writ of error of a fine, the very fine is never certified hither, but only a transcript of it *(c)*; and if the Court adjudge it erroneous, they send a *certiorari* to THE CHIROGRAPHER to certify the fine itself, and it is actually cancelled here. * [178]

And after they had taken time to consider, PER CURIAM it was filed, and a *procedendo* awarded (*d*).

(*a*) 1. Keb. 170.
(*b*) See Davis *v.* James, 1. Term Rep. 372. Tidd's Pract. 184.
(*c*) See S. C. 1. Salk. 341.
(*d*) But, except upon returns from the city of *London*, the Court will not enter into the consideration of the validity of a bye-law upon the return to a *habeas corpus*, Ballard *v.* Bennett, 2. Burr. 777.

The Queen *against* Foxby.

Case 257.

To a *writ of error* on a judgment for being a *common scold*, the defendant must assign error in person.—S. C. ante, 11. S. C. post. 213. 239. S. C. 1. Salk. 266. S. C. Holt, 274.

FOXBY was convicted by the justices of peace at their quarter-sessions at *Maidstone*, upon an indictment for being *a common scold*, and judgment that she should be *ducked*: whereupon she

brought

THE QUEEN *against* FOXBY.

brought *a writ of error*, having obtained *a warrant* for that purpose from THE ATTORNEY GENERAL (*a*); and hereupon the sheriff let her go at large, there being no fine or imprisonment in the judgment.

PER CURIAM. She must assign error in person.

The way to bring *error* upon an indictment.
1. Salk. 149.
Stra. 849, 1246.

NOTE, The most usual way of bringing *writs of error* of judgment upon *indictments* is, to remove the record into THE CROWN OFFICE by *certiorari*, and then bring A WRIT OF ERROR *coram nobis*; but one may directly remove it by *writ of error*; and either way is good.

Manner of bringing error on an *indictment*.
1. Vent. 53.

But, after *writ of error*, the course is, to serve a rule in THE OFFICE to assign error; and, if they fail, to have a peremptory rule, which must be upon motion; and upon default in that, to nonsuit them upon the *writ of error*, and award execution.

(*a*) See upon this subject Rex *v.* Wilkes, 4. Burr. 2550.

Case 258. The Queen *against* Tracy.

If an indictment for a conspiracy against several, charge the acts of some of the defendants in the parish of *St. Giles* in *Middlesex*, and of the others in the parish of *St. Margaret's* in the same county, and a *venue* be awarded to *St. Giles's* only, it will be a *mis-trial*, for the jury ought to come from *both* the parishes.

TRACY was again indicted, for that he, together with *Taylor* and *Jeoffreys*, with intent to oppress *Muriell*, *falsò*, *nequiter*, &c. did at the parish of *St. Giles'*, in the county of *Middlesex*, get *Muriell* arrested, by pretext of a certain warrant from THE RECORDER OF LONDON, reciting the substance thereof, as before; and that after he was arrested, they brought him before CHAMBERLAINE, justice of the peace, in the parish of *St. Margaret's*, in the said county; and that *Tracy* did there, with farther intent to oppress him, falsely, maliciously, &c. persuade the said *Chamberlaine* to refuse bail for him, though sufficient bail was then tendered to him, and procured him to refuse the said bail, and to commit him to jail; and avers the refusal of bail and commitment; and likewise that *Tracy* did persuade and procure *Taylor* and *Jeoffreys* to lay him in irons, and use him severely; and that they did threaten to iron him, and by that means extorted five pounds from him.

He * having entered into *a recognizance* to try this indictment, the *venire* was made from the parish of *St. Giles's* only.

* [179]
S. C. ante, 30. 114. 169.
S. C. 3. Salk. 192.
S. C. Holt, 706.

And after verdict and conviction, IT WAS HELD *a mis-trial*; for here being several facts arising in several parishes, *the venue* ought to come from both (*a*), and so judgment could not be given upon the indictment.

A recognizance conditioned to try an indictment, is forfeited, though there be a trial, if the verdict is quashed for a defect in the *venire facias*.—1. Roll. Abr. 433

But THE COURT held, that he had forfeited his *recognizance*; for he had not tried the indictment, for it must be a trial with effect on which the Court may proceed to judgment; for if we do not estreat the *recognizance*, every defendant will wilfully make

(*a*) See Scott *v.* Erest, 3. Term Rep. 238.

faults,

faults, so that they shall always go unpunished. And we may award a *scire facias* upon the recognizance here in this court, and determine it ourselves, or have it estreated into THE EXCHEQUER.

THE QUEEN *against* TRACY.

And a new *venire facias* was directed, and the defendant forced to give a new recognizance, or he must have gone to jail.

If a *venire de novo* be granted on an indictment after a *mis-trial*, the defendant must enter into a new *recognizance*.

NOTE, Here it was said, that it being a fact in *Middlesex*, the *venue* might be made returnable *de die in diem*, and it being quashed, they might date the new *venue* on the day of return of the first.

How a *venire* may be *dated* and *returned* in *Middlesex*.

TRACY being again convicted upon a new *venue*,

IT WAS NOW MOVED *in arrest of judgment* by EYRE, that here was no offence in the indictment.

FIRST, The taking a man up by virtue of a lawful warrant is lawful, and cannot be malicious, or with ill intent, and quoted *Rex v. Elliot*, *Cro. Car.* 608. (*a*).

SECONDLY, As to the other part, *viz*. persuading *Chamberlaine* to refuse bail, was only his opinion, which though false, yet it is not punishable.

And THIRDLY, As to the extortion in jail, it did not appear to have been by his direction.

If a person procure another to be arrested, and maliciously persuade the justice to refuse his bail, and the gaoler to extort money from him for fees, it is an *indictable* offence; although the original arrest was by virtue of a *legal warrant*.

But PER CURIAM, If a man get another wrongfully put in jail, and there the keeper extort money from him, he that wrongfully put him in, is guilty of the oppression of taking the money. If a man falsely imprison *J. S.* and the jailor detain him until he pay so much money, he shall have his action of false imprisonment, and taking so much money from him against such person. So here, though the warrant be legal, yet if one, with intent to oppress a man, get him taken up by this warrant, and follow him to a justice of peace to hinder his being bailed, it is illegal; for it is illegal to use a lawful means for oppression: It is an offence in a justice of peace to refuse bail in case of a *common misdemeanor* (*b*). And it suffices to say in the indictment, that sufficient bail was tendered; without saying, that the party knew them to be sufficient.

AND HERE it was said, that *Tracy* persuaded *Chamberlaine* to commit him, and that he did commit, without saying, that it was *super inde*; yet it was held well.

An indictment for persuading *A.* to commit *B.* is good, without saying, he was *thereupon* committed.

(*a*) 2. Hawk. P. C. ch. 23. f. 11.
(*b*) Hale Sum. 98. 1. Com. Dig. "Bail," (F. 3.)

Anony-

Case 259.

Anonymous.

Sheriff cannot bail on an arrest for misdemeanor.

HOLT, *Chief Justice*, If one be taken into custody by *a process* from THE SESSIONS to the sheriff, he must give *a bail-bond* according to the statute of 23. *Hen.* 6. c. 9. (*a*).

One justice may bail when one may grant warrant.

And where-ever one may be taken up by warrant of one justice, any one justice may bail (*b*).

Justices may commit or bail in cases of misdemeanor before indictment found. 6. Mod. 80.

Formerly indeed none could be taken up for *a misdemeanor* until indictment found, but now the practice over all *England* is otherwise (*c*). And PER HALE (*d*), That practice is become a law, and justices of peace *eo ipso* may bind to the peace, and over to the sessions, for any *breach of peace* before an indictment found.

(*a*) But it is decided in a late case, that the sheriff has no authority to take *a bond* for the appearance of persons arrested by him under process issuing upon an indictment at the quarter-sessions for a misdemeanor; he can only take *a recognizance* for their appearance Bengough *v.* Rossiter, 4. Term Rep. 505. for whatever power the sheriff might have had in this respect under the statute 23. *Hen.* 6. c. 9. it was taken away by the 1. *Edw.* 4. c. 2. 2. Hawk. P. C. c. 15. s. 27.

(*b*) Hale's Sum. 105. 1. Com. Dig. "Bail" (F. 4.)

(*c*) 2. Hawk. P. C. ch 13. s. 11.

(*d*) 2. Hale's P. C. 108.—See also 4. Bl. Com. 287.

* [180]

Case 260.

* The Queen *against* West.

An order of filiation made on the examination of one justice, is bad, although two justices make the adjudication; for the examination is a judicial act, and both must be present. S. C. 11. Mod. 59. S. C. 2. Ld. Ray. 1157. 2. Salk. 73. 2. Salk. 477. 488. 6 Mod. 322. And. 238. Burr. S. C. 137. 1. Bac. Abr. 329. Ld. Ray. 55. 1198.

AN ORDER of two justices recites, That WHEREAS oath was made before *one* of them by the mother of a bastard, that *B.* was the father of it; and that by examination of her by *one* of them, it did appear that *B.* was the father, therefore *they* adjudge him to be so, and order him to pay so much.

PER CURIAM. The examination is a *judicial act*, and ought to be by *both*; and it is not enough that one of them should examine, and make a report to the other; but if they be both present, and one alone examine, that will be well; for there the examination of one is the examination of the other (*a*).

And by HOLT, *Chief Justice*, Where two justices of the peace are ready to bail one, they ought to be both present to do it; and it is not enough that one of them should first sign the recognizance, and then send it to another, though the contrary be sometimes irregularly practised.

And here the order was quashed; and the party bound over to appear at the next quarter-sessions.

(*a*) See Billings *v.* Prim, 2. Bl. Rep. 1018. in point. So an order of removal, Rex *v.* Wykes, 2. Stra. 1092. An appointment of overseers, Rex *v.* Forrest, 3. Term Rep. 38. An assent to the indenture of a parish apprentice must be by two justices, Rex *v.* Hamstall Ridgware, 3. Term Rep. 380. But an order of removal signed by two justices separately, and in different counties, is only voidable, not void, Rex *v.* Stotfold, 4. Term Rep. 596.

NOTE;

NOTE, The party must be present in court in this case, when the motion is made for quashing the order.

The reputed father must be present on motion to quash an *order of filiation*.—2. Salk. 475.

Anonymous. Case 261.

BY HOLT, *Chief Justice*. The *martial law* is not a fixed, but a transitory law, variable by THE GENERAL, as occasion and circumstances require, according to THE ARTICLES OF WAR (*a*).

MARTIAL LAW *is transitory*. Vide Gazette, May 24, 1718.

(*a*) See the case of Grant *v.* Sir Charles Gould and Others, 2. H. Bl. Rep. 69.

The Queen *against* Cotesworth. Case 262.

MONTAGUE took exception to the caption of an indictment, that it was presented "*per jurator' elect' triat' jurat' et onerat' ad inquirend' pro dominâ reginâ et corpore com'*," instead of *pro corpore com'*.

Which was agreed PER CURIAM to be the right way: BUT THEY HELD it well notwithstanding; for it is good sense that they were "charged to inquire for the queen, and in behalf of the "county."

The caption of an indictment is good, although not said "*for the* "body of the "county." S C. ante, 172. S.C. 3.Salk. 191. 2. Hawk. P. C. ch. 25. s. 126.

Anonymous. Case 263.

BY HOLT, *Chief Justice*. Let it be A RULE for the future, that when one is brought up by *habeas corpus*, the return remain in court, and a copy of it only given to THE MARSHAL; and so of *a committitur*.

Returns of *habeas corpus* to remain in court.

Anonymous. Case 264.

PER CURIAM. If an *excommunication* in the plaintiff be tendered for plea in *abatement*, though it be signed by COUNSEL, yet by the course of court it is not to be received unless it be produced under SEAL, though the plea need not mention that it is so [illegible]ed: and so of *an outlawry*.

Excommunication and *outlawry*, when pleaded, must be produced under SEAL.

* [181]

* Jenkins and his Wife *against* Plombe. Case 265.

Easter Term, 3. *Anne*, *Roll* .

THE COURT having taken time until this Term to consider of the case, declared unanimously, that in this case the defendant ought to have costs; upon this ground assigned by HOLT,

On an *indebitatus assumpsit* brought by husband and wife executrix, declaring, that the defendant was indebted to them *as executor* of *A. B.* for so much money received by him to their use as executor, if the plaintiffs are *nonsuited*, they shall pay *costs*.—S. C. ante, 91. S. C. 2. Salk. 207. S. C. 3. Salk. 105. S. C. Holt, 313. S. C. 11. Mod. 174. Carth. 254. 297. 386. 6. Mod. 108. 10. Mod. 276. 11. Mod. 135. 174. 256. 12. Mod. 440. 1. Barnes, 90. 103. 110. 2. Barnes, 99. 106. 122. 1. Ld. Ray. 224. 443. 2. Ld Ray. 865. 1308. 1371. 1413. 1. Stra. 18[illegible] 682. 2. Stra. 871. 977. Comy. Rep. 162 3. Peer Wms. 347.

HERNE AND HIS WIFE *against* PLOMES.

Chief Justice, that if the plaintiff, having married *the executrix*, had ordered, as he might have done, *J. S.* to receive this debt which was due to the testator, and he had accordingly received it, that had been a good payment and discharge of the first debt; and *J. S.* would now become indebted to the plaintiff by a contract in the plaintiff's time, *viz.* the appointment and receipt; and he in that case might bring an *indebitatus assumpsit* against *J. S.* for so much money received to his use *as executor:* and here, though the defendant received the money without any previous appointment of the plaintiff, yet the plaintiff, by bringing this action, having assented to the receipt, it amounts to an appointment, and a discharge of the first debtor, and makes a contract between the defendant and him: and here the plaintiff needed not have named himself executor, it being upon a contract with himself: his saying that it was to his use as executor, is true, and therefore no harm, but rather better, for it shews how the right came; for if here he had been *an administrator* instead of *an executor*, and declared as such and recovered, and then administration had been revoked, the defendant would be relievable by *audita querela*. And it is a true rule, that where the executor need not name himself executor, he shall pay costs upon *a nonsuit*, and the naming himself executor shall not exempt him from it: and where an executor recovers in a case in which he need not name himself executor, and dies intestate, or makes his executor, who will not prove the will, as to the first testator's goods, his executor or administrator, and not the administrator *de bonis non* of the first testator, shall sue execution, and would be liable to the *costs* of a nonsuit of him, and not the administrator *de bonis non:* and though here the executor should bring the action in his own name, yet the debt recovered are *assets* in his hands. If an executor live at *London*, and the goods which the testator died possessed of are at *Bristol*; yet the executor has such immediate possession of them, that he may maintain *trover* for them in his own name against any converter of them, and the damages recovered shall be *assets* in his hands; but if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers; as if the goods be perishable goods, and before any default in him to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself: but if one take goods out of his possession, he must sue him that took them, to have an opportunity of discharging himself of answering more in *assets* than he recovers: so if an executor will omit to

[182] sell the goods at a good price, and afterwards they are * taken from

Salk. 116, 17. him, there the value of the goods shall be assets in his hands, and not what he recovers, for there was a default in him. And in this case, if the receipt was by the defendant after the plaintiff's marriage with the executrix, *the husband* alone should have brought the action; but if the receipt were in the wife's time, before

the

the marriage, the *husband and wife* ought to join in the action.

JENKINS AND HIS WIFE *against* PLOMER.

So PER TOTAM CURIAM, the defendant must have costs (*a*).

(*a*) See Bull *v.* Palmer, 1. Freem. 424. Nicholas *v.* Killigrew, 1. Ld. Ray. 436. Cockerill *v.* Knyston, 4. Term Rep. 277. and Goldthwayte and his wife executrix *v.* Petree, 5. Term Rep. 234. where the law of this case is confirmed.

Anonymous.

Case 266.

PER CURIAM. If cause of action arise part in one county and part in another, the plaintiff has election in which of the counties to lay it (*a*), and in that case the defendant shall not upon *the common affidavit* change it.

If a cause of action arise part in one county and part in another, the *venue* may be laid in either.—Dyer, 38. 40. 338. 7. Co. 2. 1. Lev. 114. Cro. Car. 20.

But where the cause of action is *transitory*, and the plaintiff lays it in another county than in that in which it did in truth arise, and the defendant by *the common affidavit* would change it into a different county, the plaintiff shall not come and say that it did arise in another county, and be bound to give evidence there (*b*).

In what case the *venue* may be changed.

1. Vent. 17.

(*a*) See Patterson *v.* Scott, Stra. 776. and Scott qui tam *v.* Brett, 2. Term Rep. 238.

(*b*) The *venue* may in general be changed in any transitory action, on motion grounded on an affidavit that the cause of action, if any, arose in a different county, and not in the county in which the *venue* is laid; but the rule to shew cause for this purpose may be discharged on motion, the plaintiff undertaking to give material evidence in the county where the *venue* is laid; and if, on the trial, he do not give such evidence, he will be nonsuited. 1. Com. Dig "Action," (N.13.) Mr. Kyd's Edition, where all the cases upon this subject are collected. Foster *v.* Taylor, 1. Term Rep. 782. Watkins *v.* Towers, 2. Term Rep. 275. Allen *v.* Griffiths, 3. Term Rep. 495.

The Queen *against* Daniel.

Case 267.

PER TOTAM CURIAM. This Term, the indictment is naught.

An indictment will not lie for inticing an apprentice to leave his service.

FIRST, The inticing *an apprentice* or *a servant* to depart from his master, is not an offence of a *publick nature*, but the party's remedy is by an *action upon his case*, which he may well maintain (*a*).

Pop. 135. 2. Rol. Ab. 75. Skinner, 11.

SECONDLY, A common *action of trespass* will not lie for inticing an *apprentice* or *servant* from his master. But if one will take away my servant or apprentice by *force*, trespass will lie for the master, declaring upon the force, *per quod servitium amisit* (*b*).

Trespass lies for taking a servant from his master. S. C. ante, 99. S. C. post. 289.

S. C. 1. Salk. 380. S. C. 3. Salk. 191. S. C. Holt, 346. S. C. 2. Ld. Ray. 116.

THIRDLY, Here it does not appear whether he was *a servant* or *an apprentice*, and a manifest difference is taken in 21. *Hen.* 6 pl. 23. between a servant and an apprentice. An apprentice must be by deed, a servant may be by parol contract. An apprentice cannot be discharged but by deed, but a servant may be discharged by parol.

There is a difference between a *servant* and an *apprentice*.

(*a*) See Cowp. 55.

(*b*) See Reavley *v.* Mainwairing and Walker, 3. Burr. 1306. and Hart *v.* Aldridge, Cowp. 54.

FOURTHLY,

FOURTHLY, The inticing to embezzle his master's goods has no *venue* to it, and therefore that is bad.

An indictment for procuring a servant to leave his master, must aver that he did leave him.—4. Com. Dig. "Indictment," (G. 3.)

FIFTHLY, By POWELL, *Justice*, "Procuring to depart and "absenting himself from his master's service," is bad, without positively averring that he did depart.

An indictment for absenting from service must aver how long absent.

SIXTHLY, by POWYS, *Justice*, It ought also to appear how long the absence or departure continued; for here, for aught that appears, it might be but for half an hour.

An indictment for being "*a common procurer*," is bad.

And PER OMNES, The precedent in *Rastall* is perfect nonsense; for it was, that the defendant procured his servant to leave him, and that he was "a *common procurer* of servants."

Post. 311. 1. Mod. 71. 2 Keb. 24. 687. 1. Sid. 282. 7. Mod. 52. 1. Salk. 382. See 4. Com. Dig. "Indictment," (G. 3.)

* [183]
Case 268.

* Grant *against* Southers, Marshal of the King's Bench.

A prisoner suffered voluntarily to escape by one MARSHAL, may, on a voluntary surrender, be lawfully detained by his successor.

Ante, 113.

GRANT had been in custody of the former MARSHAL, and voluntarily suffered to escape by him. *Grant* afterwards came voluntarily and returned, and being found in custody by the succeeding MARSHAL, was detained by him.

Whereupon *Grant* brought an action of false imprisonment.

THE COURT granted an *imparlance* until the next Term, affirming at the same time that it was lawful to detain him, and that to suffer him to go at large would be an escape in the second MARSHAL; and that HALE, *Chief Justice*, had been of the same opinion (*a*).

(*a*) HOBART, *Chief Justice*, was of opinion, that if a sheriff suffered a prisoner voluntarily to escape, and he returned again, and remained in gaol until a new sheriff was appointed, an action would not lie against the new sheriff for a new escape from his custody, because the execution was utterly discharged by the first escape, Case of the Sheriff of Essex, Hob. 202. But in the case of James *v.* Peirce, this case is denied to be law. And it is held by HALE, *Chief Justice*, that if a person in execution be voluntarily permitted by the Warden of the Fleet to escape, and he surrender, and then a new warden is appointed, and he again escapes, an action of debt will lie against the new warden for this escape. 2. Lev. 132. If a sheriff die, his successor is bound to take notice of all the prisoners that were in his custody, Westly's Case, 3. Co. 71. and until a successor be appointed, this obligation falls upon the under sheriff, 3. Geo. 1. c. 15. s. 8. By 20. Geo. 2. c. 37. "All sheriffs shall, "at the expiration of their office, turn "over to the succeeding sheriff, by INDENTURE and schedule, all writs and "process unexecuted;" and, by the common law, 3. Co. 71. all the prisoners in his custody with their respective executions, Cro. Eliz. 366. A sheriff therefore is not liable for an escape unless the prisoner has been regularly delivered to him by the former sheriff, 2. Barnes, 259. Cro. Eliz. 366. or legally arrested by his own officers, De Morander *v.* Dunkin, 4. Term Rep. 120. or be in custody by regular surrender, Watson *v.* Sutton, 1. Salk. 272. but the voluntary return of a prisoner before action brought, is equal to a re-taking upon fresh pursuit, Bonafous *v.* Walker, 2. Term Rep. 126. but after a voluntary escape, the sheriff cannot retake a prisoner, Atkinson *v.* Jameson, 5. Term Rep. 25. See also Alsept *v.* Eyles, 2. H. Bl. Rep. 108.

And

And THE COURT declared that they knew no ſuch thing as *a perpetual imparlance*, though they had known *perpetual injunctions*.

The Court may grant imparlances perpetually, for the ends of juſtice.

The Queen *againſt* Steer and Others.

Caſe 269.

STEER and others were indicted, for that at ſuch a place in the county of *Suffolk*, *vi et armis*, in the defendant's pond *illicitè et injuſtè piſcerunt cum retibus*, and ſo many CARPS, *de bonis et catallis* of the proſecutor, did take and carry away.

An indictment lies for fiſhing in another's private pond, and taking and carrying away ſo many *carps*, the *goods and chattels* of the proſecutor.

BROTHERICK moved to have the indictment quaſhed,

FIRST, For the inſenſibility of the word *piſcerunt*.

SECONDLY, For that theſe being fiſh in a pond, they could not be *bona et catalla* of any perſon.

S. C. 3. Salk. 189. 291.
2. Keb. 178. 594.
2. Salk. 637.
3. Mod. 97.
Ld. Ray. 239.

PER CURIAM. The inſenſibility of the word "*piſcerunt*" would not have vitiated, had the taking and carrying away of the fiſh been well laid. If a man has a cloſe pond in which there are fiſh, he may call them *piſces ſuos* in an indictment, or he may not do it, at his pleaſure, and either way is good; becauſe being in a cloſe pond, the property *ratione loci* in them cannot be loſt, becauſe they cannot ſwim away; but notwithſtanding he cannot call them as *bona et catalla*, if they be not in trunks; and for that the indictment is bad, but however not fit to be quaſhed on motion, the offence of fiſhing in other men's ponds, and taking away their fiſh, being too great to receive ſo much countenance (*a*).

(*a*) See the ſtatute 5. G... 3. c. 14. 1. Hawk. P. C. Appendix t' Third.

TRINITY TERM,

The Third Year of Queen Anne,

AT

The Sittings at *Nisi Prius*,

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

THE COURT OF QUEEN'S BENCH,

Anonymous. Case 270.

HOLT, *Chief Justice*. There needs no privilege to make *a fish pond*, as there needs in case of *a warren*. Fish pond and warren.

Anonymous. Case 271.

HOLT, *Chief Justice*. One cannot declare against A CORPORATION aggregate as *in custodiâ mareschalli* (*a*). Summons, attachment, and distress, is the only way of proceeding against a corporation.—12. Mod. 559. 672. Ld. Ray. 79. Stra. 612. 614 1241. 3. Peer Wms. 426. 1. Brown's Ch. Rep. 471. 1. H. Bl. Rep. 209. Kyd on Corporations vol. i. page 271. 5. Com. Dig. "Pleader," (2. B. 2.)

(*a*) Skin. 2. 154. 5. Com. Dig. "Pleader," (2. B. 2.) Tidd's Practice, 20.

Anonymous. Case 272.

PER CURIAM. One is indictable for setting up a market, or a fair, or a leet. To set up a fair, market, or leet is indictable.

* It is an usurpation upon the queen, for which she may bring a *quo warranto*, where there may be two judgments; the one, for seizure of the franchise into the queen's hands; the other, for a fine for the usurpation; and to keep a leet to summon the subject to make presentments, and to amerce, is a grievance to the people besides. So of fair or market, if they take toll of people. * [184] 4. Com. Dig. "Indictment" (D.) Ld. Ray. 149.

Case 273. Anonymous.

In what case interest shall be allowed on a bond.

S. C. ante, 167.

HOLT, *Chief Justice.* If a bond be for four hundred pounds, with condition to pay two hundred at a day, without mention of any *interest* to be paid for the two hundred pounds, so that if the two hundred pounds be paid at the day, the bond is saved; though the money be not then paid, so that now the obligor cannot be relieved against the penalty without paying interest, yet such bond needs no specification by the late act of parliament.

TRINITY TERM,

The Third Year of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powis, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Esq. Attorney General.*
Simon Harcourt, *Esq. Solicitor General.*

Herring *against* Crocker. Case 274.

If a *fieri facias* be taken out, and the goods levied before judgment entered on the roll, and another *fieri facias* is delivered to the sheriff upon another judgment, to which he returns *nulla bona*, and then the goods are sold under the first writ, and satisfaction entered, but the roll not filed; the Court will not, on an action brought by the *second plaintiff* against the sheriff for a *false return*, give the *first plaintiff*, who had indemnified the sheriff, leave to file his roll. S. C. Holt, 402. Post. 191. 1. Saund. 39. 7. Mod. 37. 118. 12. Mod. 146. 177. 1. Ld. Ray. [illegible] 2. Ld. Ray. 990. 4. Com. Dig. "Execution" (D. 1.). Dougl. 415. 1. Term Rep. 118.

JUDGMENT was obtained by confession three Terms before, and before any entry on THE ROLL of the judgment a writ of *fieri facias* was taken out, and the sheriff, taking security for his indemnification from the plaintiff in that judgment, levied goods to the value. And now another *fieri facias* upon another judgment being brought to him, he returned *nulla bona*. The goods were sold upon the first writ, and the money paid by the sheriff, and satisfaction entered upon the judgment, but THE ROLL was not filed. The plaintiff in the second *fieri facias* brings an action of *false return* against the sheriff.

IT WAS MOVED *for the plaintiff* in the first *fieri facias* to have leave to file his roll.

PER CURIAM. How can an action for a *false return* be maintained against the sheriff if there be no fraud in him? and if there be, you have your remedy, notwithstanding the filing of this roll, as well as if it be not filed. The sheriff would not be liable to the defendant in the first judgment in trespass, for the writ is enough to justify him, and he is not bound to examine any far-

HERRING *against* CROCKER.

ther (*a*). By the ancient rules of the Court, the judgments of one Term ought to be entered upon THE ROLL before the *eſſoin-day* of the next Term, and the ſtatute for docketing of judgments was only in imitation of the ancient courſe, and in aid of it.

HOLT, *Chief Juſtice*. The common law is, and that is indulgent enough, that all things done in *the Vacation* ſhall refer to *the precedent Term*; and though no inconvenience appear to us if this judgment be now filed as of the due Term, yet we cannot foreſee how far ſuch a retroſpect may affect others. If this firſt debt be a juſt debt, and the party, without any compulſion, had paid it before your writ came to the ſheriff, it had been good againſt you: ſo here, if the debt were juſt, and a writ had come to the ſheriff, and he had levied the money, and paid it before the
*[185] ſecond writ had come to * him, it had been good againſt the ſecond plaintiff (*b*), though the firſt had no judgment.

Therefore he adviſed DARNELL, *Serjeant*, to conſider of it again before he proceeded with the action againſt the ſheriff.

And they would not grant the motion.

(*a*) See 4. Com. Dig. "Impriſonment" (H. 8.).

(*b*) See Rocke *v.* Dayrell, 4. Term Rep. 402.

Caſe 275. The Queen *againſt* Beſt and Others.

An indictment for conſpiring to charge a man with being the reputed father of a *baſtard child*, need not aver that the perſon charged was not the father; but the *order of filiation*, while unreverſed, is concluſive evidence of his being the *reputed father*.

S. C. ante, 137.
S. C. 1. Salk. 174.
S. C. Holt, 151.
S. C. 2. Ld. Ray. 1167.
S. C. 3. Ld. Ray. 169.

THE defendants were indicted, for that they, being idle, ſcandalous, and wicked perſons, in order to oppreſs and defame one *Peter Pickering*, and to get unto themſelves unlawful gains of money from the ſaid *Peter Pickering*, did *falſò*, *nequiter*, *malitioſè*, &c. conſpire, contrive, and agree among themſelves, *falſò* to charge the ſaid *Peter Pickering* with being the father of a baſtard child, with whom they pretended one *Elizabeth Church* to be then big, and that in purſuance thereof they did *falſò* affirm him to be the father of it.

Upon demurrer, now BROTHERICK took exception,

FIRST, That it was not averred, *ubi revera* he was not the father of it, or *ubi revera* the ſaid *Elizabeth Church* was not then with child; and that it was eſſentially neceſſary to the maintaining ſuch indictment to aver that the party was innocent (*a*). And it is ſo far from being falſe that he was the father of the child, that he is adjudged to be ſo by the juſtices of peace, and ordered to maintain it. And if this were an indictment for perjury, for falſly ſwearing that a deed was executed by ſuch a party, without

Ante, 100. 1. Keb. 233. 254. 2. Keb. 59. Hob. 219. 8. Mod. 10. 321. 10. Mod. 16. 216. 219. 12. Mod. 248. 255. 454. 542. 1. Ld. Ray. 81. 377. 2. Ld. Ray. 1169. 1. Stra. 193. 2. Stra. 1227. 4. Com. Dig. "Indictment" (D.).

(*a*) 9. Co. 53. a.

ſaying

saying *ubi revera* no such deed was executed, the word *falsò* would not even by intendment import that the deed was not executed, but only that the party that swore it was a false person generally; and if issue were taken that he did not falsly affirm it, the affirmation, and not the falsity, would not be triable. THE QUEEN *against* BEST AND OTHERS.

DEE, *contra.* The indictment is grounded merely upon the conspiracy to charge falsly; and this conspiracy, with the subsequent false affirmation, is sufficient to maintain the indictment within the express resolution of *the Poulterers' Case.*

HOLT, *Chief Justice.* Though a conspiracy to charge falsly be indictable, yet the party ought to shew himself to be innocent, for people may lawfully meet, and contrive and agree to charge a guilty person; and to say that they met and agreed to charge falsly, perhaps will not be enough, without shewing the foundation of the falsity, *viz.* the party's innocence. And here, if the defendants had pleaded *not guilty*, they must have been acquitted; for the order of two justices standing * in force, would have concluded *Peter Pickering* from giving evidence of his innocency. * [186]

An illegal conspiracy is indictable, though nothing be done in pursuance of it.

BROTHERICK took another exception, *viz.* that it does not appear that any thing was done in pursuance of the conspiracy, and that also ought to appear, according to *The Poulterers' Case (a).*

DEE, *contra*, to shew that a false conspiracy, without further act of pursuance, is indictable, quoted 1. *Sid.* 68. 1. *Leo.* 62.

S. C. Salk. 174. S. C. Holt, 151. Ante, 100. Ld. Ray. 379.

And the case being spoke to again this Term,

MONTAGUE, *for the defendants*, urged, that it ought not only to appear that the accusation was false, but that it was before a lawful magistrate; otherwise it could not be a legal accusation.

SECONDLY, And if this were *a writ of conspiracy*, it would not have lain before an acquittal, and then there would be no need of an averment of the party's innocence, because the acquittal would tantamount. And he insisted, that if this had been for *perjury*, there must be an averment that the matter sworn was not true, and that the *falsò* would not serve; and for that he quoted the case of *The King v. Gripe.* And he took a diversity between *a conspiracy* and *a confederacy*; the one must be in *judicial proceedings*, the other may be *in pais (b)*; but this indictment is for a conspiracy. 3. Mod. 220. 2. Inst. 561, 562.

But on the other side was quoted a precedent out of *West (c)*, agreeing with this: It was for conspiring falsly to charge one with felony, without any averment that he was innocent. In the *Year-Book (d)*, a conspiracy laid in one place to charge with a

(*a*) 9. Co. 59. Moor, 813.

(*b*) See the statute 28. *Edw.* 1. c. 10.

(*c*) West's Precedents 2. page 102. f. 97 which POWELL, *Justice*, said, was a pretty judicious book; but HOLT, *Chief Justice*, said that there are many bad precedents in it. See 2. Ld Ray. 1169.

(*d*) 42. *Edw.* 3. pl. 15.

THE QUEEN *against* BEST AND OTHERS.

fact in another county, and *the venue* came from the county where the conspiracy was laid.

HOLT, *Chief Justice.* Your case of *perjury* is not like this; for there the crime merely consists in the fact sworn, and the matter is indifferent until the averment of *ubi revera* comes: but here is a confederacy to charge a man *falsò*, *nequiter*, *malitiosè*, *&c.* and though the word *confederaverunt* be not in, yet there are the words *machinaverunt et aggregaverunt*, which are as full. This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous judgment, and loss of *liberam legem*, as upon conviction on an attaint, and for which an
1. Cro. Jac. 131. acc. indictment will not lie until acquittal, or an *ignoramus* found (*a*). But this seems to be a conspiracy *latè loquendo*, or a confederacy to charge one falsly, which sure, without more, is a crime (*b*); and it is a crime for several people to join and agree together to
2. Cro. Jac 8. prosecute a man right or wrong. If in an indictment for such confederacy you proceed further, and shew a legal prosecution of the confederacy, there you must shew the event thereof, as "*ignoramus*" returned on the indictment, or an acquittal, or else
Cro. Jac. 131. contra. the indictment fails; but where you rest upon *the confederacy*, it will be well without more.

Vide ante, 100. 137. 169.

And it seemed to THE WHOLE COURT, that the very agreeing together to charge a man with a crime falsly, is a consummate offence, and indictable: and as to the want of averring his inno-
* [187] cence, every * man is presumed innocent until the contrary appears, and the *falso* strongly implies his innocence. Indeed, if the truth had been, that there was a woman with child, and the parish likely to become chargeable, and the defendants being parish-officers had met to inquire and find out the father, to save the parish harmless, and, upon such an occasion, should, upon their information, charge this *Peter Pickering* to be the father, and the indictment had been for that, they must have been acquitted.

And though ALL THE COURT were clear for THE QUEEN, yet at the importunity of BROTHERICK, they let it pass over until the next Term.

Ante, 137, 138. 169. 2. Haw. ch. 43. sec. 25. ch. 46. sec. 19.

And in the Trinity Term after, JUDGMENT was given for the queen. For it is a conspiracy to charge one falsly with fornication, which, though it be no crime at common law, is punishable in the spiritual court; and a confederacy falsly to charge with a thing that is a crime by any law is indictable, and the confederacy is the *gist* of the indictment. PER TOTAM CURIAM.

(*a*) Fisher *v.* Bristow, Dougl. 215. Wicks *v.* Fentham, 4. Term Rep. 247.

(*b*) See Rex *v.* Spragg, 2. Burr. 993.

Anonymous.

Anonymous. Case 276.

HOLT, *Chief Justice*. If an attorney will take a man's money to do business, and does not do it, we may enter into a summary examination of it, and if we find him refractory, we may strike him out of THE ROLL.

The Court may proceed in a summary way to strike an attorney off THE ROLL. Ante, 16. 42. 86. 4. Inst. 102. marg. Ray. 194. Pr. Reg 7. 2 Lev. 66. Latch. 124. 1. Com. Dig. "Attorney" (B. 15.). 4. Burr. 2060. 2 Bl Rep 780. 2. Wils. 371. 382. 2. Hawk. P. C. ch. 22. s. 11. 1. Bac. Abr. 192. Cowp. 829. Dougl. 114.

The Queen *against* Wheeler. Case 277.

INQUISITION before the coroner, *super visum corporis*, that the *wheel of a forge* moved to the death of the deceased.

And now it was moved to stay process for seizing it as *a deodand*, because it was parcel of a freehold, as the wheels of a mill or a mill-stone, which were agreed to be freehold, and therefore not capable of being *a deodand*.

HOLT, *Chief Justice*. A mill is a known thing in law, and so are the parts thereof; and therefore if the owner of a mill take out one of the mill-stones to prick or gravel it, and devise the mill while the stone is severed from it, yet it shall pass as part of the mill: and *a bell* cannot be *a deodand*.

ET PER OMNES, Let process upon the inquisition stay.

(E. 2.).

The *wheel* of a forge or mill cannot be *deodand*, for, being *fixed* to the freehold, it cannot *move* to the death of a person.

1. Salk. 220. 1. Lev. 136. Ray. 97. 1. Hawk. P. C. c. 26. s. 5. 8. Stra. 67. 6. Com. Dig. "Waife" 2. Bac. Abr. 26.

[* 188]

* Britton *against* Standish. Case 278.

A LIBEL was brought against him in THE SPIRITUAL COURT, for not coming to his parish-church on *Sunday*, and not receiving the sacrament at *Easter*.

PARKER moved for a prohibition upon a suggestion, that the determination of the bounds of parishes, and the interpretation of the laws and statutes of the realm, belonged to the queen's temporal courts, and that by them no man is bound to go to his *parish-church*, so he go to some church, and that the defendant did constantly resort to another church.

And day being given by the Court for the hearing Counsel of both sides,

RAYMOND *against the prohibition*. The suggestion does not say, that he resorted to any church in which there were divine prayers. By the old received CANONS, every parishioner is bound to repair to his parish-church on *Sundays* and *Holidays*, and it is

The ecclesiastical court may proceed on the statute 1. *Eliz.* c. 2. s. 14. against a man for not going to his parish-church on *Sunday*, and for not receiving the sacrament at *Easter*; for that statute expressly subjects these offences to the cognizance of the ecclesiastical courts. *Sed qu.* if they have not an *original* jurisdiction in such cases. S. C. 1 Salk. 166. S. C. 3. Salk. 88. S. C. Holt, 141. 3. Mod. 42. 2. Vent. 44. Hard 405.

no

BRITTON *against* STANDISH.

no excuſe that he went to another church without it be upon an extraordinary occaſion, and for a reaſonable cauſe, which ought to come on his ſide, and of which the ſpiritual court are judges. By *Linwoode* (*a*) the word "*volentibus*" in THE CANON implies a liberty to pariſhioners of not coming to the pariſh-church on other days than *Sundays* and *Holidays*, which are days of obligation; and herewith agrees *Selden* (*b*). By an injunction of the Church (*c*) it is directed, that ſome diſcreet perſons of the pariſh be appointed to ſee that pariſhioners do repair to their pariſh-church, and to preſent ſuch as do fail, in order to a compulſion by eccleſiaſtical cenſures. The ninetieth canon of the Conſtitutions of 1603, and the ſtatute of 1. *Eliz.* c. 2. ſ. 14. are expreſs in the point; and the Act of Toleration, 1. *Will. & Mary*, makes alteration only in favour of *proteſtant diſſenters*, and therefore cannot avail the defendant here, he having not ſhewed himſelf one, as he ought if he would take advantage of it (*d*). Then as to the reaſon of the thing itſelf, it ſeems clear for us; for pariſhes at firſt were diſtricts, certain parts of the dioceſe, and the care of the ſouls of the inhabitants were charged upon certain prieſts, who were maintained by the dioceſan by a diſtribution of the offerings made at *Chriſtmas* (*e*); and by the ancient canons, as well as by acts of parliament, ſuch prieſts having cure of ſouls, were bound to a reſidence upon their pariſhes, the better to diſcharge that great duty; which end they could not well anſwer, or miniſter fit remedies to the ſpiritual diſeaſes of their pariſhioners, if the pariſhioners might chuſe whether they
[189] heard their inſtructions or not. * And as to the other charge in the libel, *viz.* the not receiving *the ſacrament* at *Eaſter*, *Linwood* (*f*) ſays, that all *Chriſtians* ought to receive *the ſacrament* at leaſt once a-year, *viz.* at *Eaſter* (*g*). And ſo is THE RUBRICK eſtabliſhed by parliament, and THE TWELFTH CANON of the Conſtitutions of the year 1603 (*h*).

PARKER, *contra.* As to the ſtatute 1. *Eliz.* c. 2. though the words be, "that every pariſhioner ſhall repair to his pariſh-"church," yet the true meaning of it is well expounded by other ſubſequent ſtatutes, where that clauſe of it is taken notice of, and recited according to the meaning and ſubſtance thereof, *viz.* "that every man ſhould go to his own pariſh, *or ſome other* "*church*, &c." (*i*).

HOLT, *Chief Juſtice*, ſeemed to doubt whether a pariſhioner is compellable by eccleſiaſtical cenſures, to repair to his pariſh

(*a*) Lindwood de Paroch. 136 and his Comment upon the word "volen-"tibus."

(*b*)

(*c*) See Sparrow's Collection, 72. and Injunction, 46.

(*d*) 2. Roll. Rep. 455.

(*e*)

(*f*) Lindw 8. 143.

(*g*) Lindw. 227.

(*h*)

(*i*) See 3. *Jac.* 1 c. 4 ſ. 27. 1. *Will. & Mary*, c. 18. Cawley's Law of Recuſants, 1. Pt. Spel. Conſil. 193. 2. Pt. Spel. Conſil. 141. 1. Lev. 5. 167. Cro. Jac. 480. 3. Mod. 43.

church

church on *Sundays*; for at that rate, the gentlemen of *Gray's-Inn*, of *Lincoln's-Inn*, &c. who have a chapel of their own, in which they have constant prayers, would be compellable to go to their respective parishes, a thing which was never thought they were obliged to: and he thought parishes were instituted for the conveniency of the parishioners, that they might have a place certain to repair to when they thought convenient; and a parson, from whom they had a right to receive instructions, and other church-rites: yet he agreed, that it was not commendable for a parishioner to absent himself humorously from his parish. One is indeed bound to receive *the sacrament* three times a-year; and that *Easter* was only named for direction, but not for compulsion, and seemed to be mentioned for the sake of the offerings then.

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POWELL, *Justice*, *totis viribus contra*. The truth is, we live in an age where men are apt to bring those things in question, of which our ancestors never doubted; and it is not fair to inquire so narrowly into the original of the jurisdiction of the ecclesiastical court on all occasions. It is plain they are in possession of this jurisdiction, and frequently exercise it; and if we will ask, how they come to have cognizance of testamentary matters, we shall find no other right they have to it, but constant and uninterrupted usage. As to the instance of *Gray's-Inn*, and such like, there will be usage against usage, and the repairing to such a chapel will be a reasonable excuse, and ought to be pleaded; and for a full authority in the point, he relied on *Brown's Case* (*a*), where a prohibition was denied, the question there being on the reasonableness of the excuse pleaded; of which the Court said, the spiritual court was the proper judge. And the reason of the parishioners obligation to come to church, is not for the sake of any offering or profit to the parson, but in regard that he has the care of their souls, which he could not discharge if they came not to hear him.

* GOULD, *Justice*, *accord'*. That they have original jurisdiction, is most plain in both the instances in the libel; and he quoted *Lionel Copley's Case* (*b*), and the case of *Brown v. Latten* (*c*). * [190]

HOLT, *Chief Justice*. A jurisdiction allowed to them time immemorial, must be taken to belong to them by law; but what I doubt at present is, whether this be so: and if there be any ancient canon for it, and received here before 1603, I will agree with you; but if not, no canon since, though in full convocation, can, *proprio vigore*, bind laymen (*d*).

And it was proposed to them to stay below by consent, and to *declare in prohibition* forthwith, that the matter might be judicially determined.

(*a*) 2. Roll. Rep 455.
(*b*) Hard. 406, 407.
(*c*) Hard. 503.

(*d*) See the case of Middleton v. Crofts, B. R. H. 326. S. C. Stra. 1056. S. C. 2. Atk. 650.

At

Britton against Standish.

At another day, MONTAGUE moved for a prohibition in the like case.

And then HOLT, *Chief Justice*, having viewed the authorities, and the act of 1. *Eliz.* c. 2. clearly, said, that if the libel be grounded upon the statute of 1. *Eliz.* c. 2. they may compel you to come to the parish-church, for that statute directly subjects people to the ecclesiastical law in this point; and the cases in *Hardres* (*a*) and *Rolle* (*b*) before-mentioned are direct in the point, and we must not sit here to encourage irreligion, to which people are too prone now-a-days; and if one do go to a customary chapel within the parish, it will be good excuse, but it must be pleaded.

HOLT, *Chief Justice*. If a man be a professed churchman, and his conscience will permit him sometimes to go to MEETING instead of coming to CHURCH, the Act of Toleration shall not excuse him, for it was not made for such sort of people.

But no rule was given, THE COURT saying, they would think of it before the end of the Term.

And at last, a prohibition was granted, and ordered to declare forthwith.

(*a*) Hard. 406. 503. (*b*) 2. Roll. Rep. 455.

Case 279. The Queen *against* The Parish of Thursley.

If a son be bound apprentice to his father, and the father give up his indenture to the son, and hires him out in another parish, where he serves a year, he is settled in the father's parish; for the indentures not being cancelled the apprenticeship continues.

UPON an order of sessions concerning a poor person in the parishes of ——— and *Thursley* in *Surrey*, the case was thus:

The son was bound an apprentice to his father; the father gave up his indenture to the son, and bound him out to a service into another parish for a year, where he served, but did not cancel the indenture; and becoming poor, the justices ordered him last legally settled in the parish where the father lived, because the indenture being still in force, his apprenticeship continued.

BROTHERICK urged, and IT WAS AGREED, that an *accord* with *satisfaction* would be a good discharge of this covenant; and by him here is that which in its nature tantamounts to *a satisfaction* to the father, for now he is discharged of the obligation of providing for the son as an apprentice.

Yet PER CURIAM, The indenture not being cancelled, the obligation of the apprentice continues; and if the father should get the indenture into his hands again uncancelled, and sue the son thereupon, the aforesaid agreement would not be a good plea

*[191] for the son; and * it is a good plea to *a covenant*, or even to *a promise*,

promise, that the plaintiff agreed the defendant should be discharged of it (*a*).

THE QUEEN *against* THE PARISH OF THURSLEY.

And POWELL, *Justice*, remembered the case in the *Year-Book* of *Henry the Seventh*, where one was bound by bond, and the obligee delivered it to the obligor, who omitting to cancel it, the obligee having lit on it, put it in suit; and all this was pleaded specially, and adjudged no plea.

But upon ANOTHER EXCEPTION, a rule was made to shew cause why the order should not be quashed.

(*a*) Rex *v*. Buckingham, 2. Ld Ray. 1352. Rex *v*. St. Mary Kallander, 2. Burr. S. C. 274. Rex *v*. Austrey, 2. Burr. S. C. 441. Rex *v*. Justices of Devonshire, Cald. 32. Rex *v*. St. Mary Lambeth, 1. vol. Bott's P. L. 3d. edit. 470.

Hodges *against* Templer.

Case 280.

RULE was for judgment in *Hilary Term* was twelvemonth; but costs being not taxed, MR. CLARKE, out of kindness to the defendant, gave time for settling the costs until *Easter Term*, and before costs settled, and judgment entered, the plaintiff died. The last *Hilary Term* the attorney entered up his judgment as ~~of~~ *Hilary Term* before, *viz*. the time that the rule was pronounced.

If judgment be given in any Term, it may be entered upon THE ROLL as of the same Term in which it was given at any time after. Ante, 14. 59. 184.

And now upon motion, it was set aside for irregularity; and they directed them, if they pleased, to enter it as of *Hilary* last, being the Term that they really had entered it, and enter their continuance till then, for the Court could not take notice of the plaintiff's death.

1. Salk. 401. Post. 241. 1. Mod. 1. 8. Mod. 189. 310. 10. Mod. 30. 325. 12. Mod. 250. 493. 519. Ld. Ray. 695. 850. 869. Stra. 639.

HOLT, *Chief Justice*. If one will enter a judgment as of a Term, he must actually enter it before the *essoin-day* of the succeeding Term, otherwise it shall only relate to the Term of which he enters it: and if judgment be signed in *Hilary Term*, and in the subsequent Vacation the defendant sell lands, and before *the essoins* of *Easter Term* the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser; and if one enter judgment so in Vacation, when indeed the party was dead, if he was living in the precedent Term, the judgment is good by relation (*b*).

4. Com. Dig. "Execution" (D. 1). "Pleader" (M. 4.). Cowp. 357.

(*b*) See Lord Mohun's Case, ante, 59. Tooker *v*. Duke Beaufort, 1. Burr. 147. Mayor of Norwich *v*. Berry, 4. Burr. 2277.

The

Case 281. **The Queen *against* The Inhabitants of the County of Wilts.**

On an information against *a county* for not repairing a bridge, THE ATTORNEY GENERAL may try the cause in any adjacent county, and award the *venire* either to the *body* of that county, or to the *vicinity* of any particular place therein.

THE inhabitants of the county of *Wilts* were informed against, for not repairing *a common bridge* in their county.

THE ATTORNEY GENERAL now moved for a *venire facias* to the county of *Berks*, the whole county of *Wilts* being concerned.

And PER CURIAM, The attorney general may choose which of the adjacent counties he pleases, and he may have the *venire facias* from the body of that county, or *de vicineto* of such a particular place therein next adjacent to *Wiltshire*.

And the defendant is not entitled to an imparlance upon amendment of an information.

S. C. post. 307. S. C. 1. Salk. 359. S. C. 3. Salk. 581. S. C. Holt, 339. Ante, 150. Post. 255. 1. Vent 61. 1. Hawk. P. C, ch. 77, 12. Mod. 372. 442. 503. 568. Stra. 874. 911. 1. Term Rep. 363.

Case 110. **Anonymous.**

Attornies.

PER CURIAM. An *under-sheriff* ought not to serve as *an attorney* during his shrievalty (*a*).

(*a*) By the statute 1. *Hen.* 5. c. 4. "it "is ordained, that no under-sheriff be "attorney in the king's courts during the "time that he is in office" And by a rule of Mich. Term 1654, if he do, he shall be struck off THE ROLL of attornies, and not re-admitted. See also Dalton's Sheriff, c. 115. p. 454. and the statute 3. *Geo.* 1. c. 15. Impey's Sheriff, 61.

Case 282. *** The Queen *against* Baines.**

The sessions, on articles exhibited pursuant to 1. *Will.& Mary*, c. 21. s. 6 may enquire into *excessive fines* taken by a *clerk of the peace*.

BAINES was convicted before the justices of the peace at their quarter sessions, upon certain ARTICLES of misdemeanors in his office of *clerk of the peace* for the county of *W.* (pursuant to the authority given to the justices by the statute 1. *Will. & Mary*, c. 21.) exhibited against him. And the order being removed up by *certiorari*,

MR. WELLS took several exceptions to it.

S. C. 2. Salk. 680. S. C. Holt, 512. 514. Carth. 426.

FIRST, The offences examinable by the justices must be in execution of his office only: but all the offences charged in THE ARTICLES are for the extortion of excessive fees, which is no part of the execution of the office, but rather are ward for it.

SED PER CURIAM, That is a nice distinction between taking fees and executing an office; and sure taking of fees *colore officii* is an act in the execution of an office; and an office and profits are as much the same as the lands and profits of them are one thing.

SECONDLY,

SECONDLY, The words of the statute are, "that the justices "of peace may at their sessions receive articles against him, which "said justices may, if they see occasion, convict him;" and here it appears the articles were received by such and such, eleven in all, by their names, at such a sessions, and the matter adjourned to another sessions; and there before six of the aforesaid eleven justices, *and others*, he was convicted; so the words not pursued.

Other justices than those who constitute the sessions when ARTICLES are exhibited against a *clerk of the peace* may proceed to enquire into the truth of the charges, and amove him.

Sed non allocatur: For the meaning of the statute is not, that the same individual persons who received the complaint should amove; but it is enough that they are virtually the same, *viz.* the same court; and though not one of those who received it were at the next sessions held by adjournment, it would be notwithstanding well.

11. Mod. 80. 137. 12. Mod. 13, 42. 109. Ld. Ray. 159. 163. 166. 2. Stra. 996.

THIRDLY, It does not appear that he was a *clerk of the peace* at the time of the supposed extortion committed; but it is only said, that he claimed and exercised the said office, and that might be, and he have no right to it, or that he executed it as a deputy.

In ARTICLES exhibited against a *clerk of the peace* it must be alledged that he was *clerk of the peace* at the time.

And this seemed a good exception; for if he be in by wrong, or as deputy to another, and commit causes of forfeiture, and afterwards get in by title, or as principal, he would not by reason of those precedent misdemeanors lose his office.

FOURTHLY, In the articles, which were the foundation of the proceedings, and ought to be direct and certain, one fact charged was, that he did extort and force such a person to pay him two shillings and sixpence for a *subpœna* for a witness to appear at the quarter-sessions, which was more than his just fees, without shewing what the just fees were, or laying it to have been *colore officii*, or what quarter-sessions the witness was *subpœna'd* to; for it might be the quarter-sessions of *York*, *Cornwall*, &c. and therefore not a matter in the execution of his office.

In articles against a *clerk of the peace* for extortion, it is sufficient to say, that he took more than his *just fees*.

*[193]

FIFTHLY, * Another sum articled against him for was said to be for a matter done at the quarter-sessions of his county, but not said to be *colore officii*.

Articles against a *clerk of the peace* for extortion must shew it was *colore officii*.

And by HOLT, *Chief Justice*, and POWELL, *Justice*, clearly, These ARTICLES, being a charge against the defendant to bring him under a forfeiture of his office, in which now by the late act of parliament he has *a freehold*, ought to be as direct and certain as *an indictment*: but as to the want of ascertaining what the just fees were, it is said to be more than the just fees.

The articles against a *clerk of the peace* ought to be as certain as an indictment.

And by POWELL, *Justice*, That is enough, for the justices are judges of that where the fees are not ascertained by act of parliament.

1. Show. 282. Stra. 996. 1. Vent. 19, 20. Carth. 226.

HOLT,

THE QUEEN *against* BAINES.

HOLT, *Chief Justice*, and POWELL, *Justice*. We cannot intend any thing where a man's freehold is to be forfeited; and it does not appear that the first sum was taken for any thing under his management as *clerk of the peace*, and the conviction must be according to the articles, and not exceed the extent of them.

And it being spoke to again,

The said TWO JUSTICES were clear of the same opinion: for this charge would be bad in an indictment for extortion in his office; and this summary way is severe enough, without having it more loose than an indictment, which would only subject him to a fine, whereas this is in order to a forfeiture of his freehold: and if this were an indictment, the extortion must have been laid *colore officii*; and it is not enough that the title of the articles is, that it was for misdemeanors in his office; but the instances ought to be alledged so too; and the recital in the order that it was *colore officii* is only a false inference of the justices not warranted by the articles, which are the foundation; and he cannot be convicted of anything but what he is charged with in writing; and he is charged with nothing directly in execution of his office.

GOULD and POWYS, *Justices*, *dubitantibus*, Whether this need be as certain as an indictment, for then without doubt it would be bad. And because they were not satisfied, though the other two were very clear (*ut supra*), it went over till the next Term.

If a clerk of the peace, to prevent a forfeiture, surrender to the custos, a new grant to him will not purge the forfeiture.

HOLT, *Chief Justice*. If the *clerk of the peace* had committed a misdemeanor, and to prevent a forfeiture had surrendered his office to the *custos rotulorum*, and taken a new grant, that should not purge the forfeiture, for then it would be in the power of *him* and *the clerk* to frustrate the intent of the statute; and after conviction of the *clerk of the peace* for a misdemeanor in his office, the *custos rotulorum* is to nominate another person in convenient time, and cannot name the same person again: but if an officer commit a forfeiture, and he who is to take advantage of it accept a surrender, and make him a new grant, the forfeiture is purged. It is extortion in an officer to take fees when none is due, or more than is due, or before they are due: and though *the order* (*a*) be quashed, yet he may be prosecuted again; as if an attainder of felony be reversed, the party must be tried again.

* [194] * And at another day, in *Michaelmas Term*, POWYS, *Justice*, came over to the opinion of HOLT, *Chief Justice*, and POWELL, *Justice*, that the articles were no direct charge.

But GOULD, *Justice*, persisted, that this being in case of a freehold, and by consequence the charge to forfeit ought to be certain; yet it was a freehold created by act of parliament, which act subjects it to a forfeiture for misdemeanors, and directs the charge and examination thereof in this summary way and manner, which he thought would not require so great strictness as in case of an

(*a*) Rex v. Lloyd, 2. Stra. 996.

indictment;

now here, the date of which is on the same day and year, acknowledged himself to be held and firmly bound to the said *Edmund* in the aforesaid one hundred pounds, to be paid to the same *Edmund* when he should be thereunto afterwards required: nevertheless the said *Edward*, although often requested, &c. hath not yet paid the said one hundred pounds to the same *Edmund*, but hath hitherto altogether refused, and still doth refuse, to pay the same to him, to the damage of him the said *Edmund* of ten pounds: and therefore he brings suit, &c. Winter against Garlick.

Plea.

And now at this day, to wit, *Monday* next after eight days from the day of *St. Hilary*, in this same Term, until which day the said *Edward* had leave to imparl to the said bill, and then to answer, &c. before the lady the queen at *Westminster*, comes as well the said *Edmund* by his said attorney as the said *Edward* by *John Tilladam* his attorney; and the said *Edward* defends the force and injury when, &c. and prays oyer of the writing obligatory aforesaid; and it is read to him, &c. and he prays also oyer of the condition of the same writing; and it is read to him in these words, to wit, The condition of this obligation is such, that if the above-bounden *Edward Garlick*, his heirs, executors, and administrators, for his and their parts and behalf, do and shall in all things well and truly stand to, obey, abide, perform, fulfil, and keep, the award, order, arbitrament, final end and determination of *John Hind*, of the city of *Bristol* beforesaid, gentleman, and *John Packer*, of the same city, bell-founder, arbitrators, indifferently named, elected, and chosen, as well on the part and behalf of the above-bounden *Edward Garlick* as of the above-named *Edward Winter*, to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands, whatsoever, at any time or times heretofore had, made, moved, brought, consented, prosecuted, done, suffered, committed, or depending, by and between the said parties, or either of them, so as the said award be made in writing, and ready to be delivered to either of the said parties requiring the same, on or before the eighth hour in the afternoon of this present day; but if the said arbitrators do not make such their award of and concerning the premises by the time aforesaid, that then if the said *Eduard Garlick*, his executors and administrators, for his and their parts and behalfs, do in all things well and truly stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination, of *Robert Godfrey*, gentleman, of and concerning the premises, so as the said umpire do make his award or umpirage of and concerning the premises in writing, and ready to be delivered to either of the said parties requiring the same, on or before the eighth hour in the afternoon of the day next ensuing the date of these presents, then this obligation to be void, or else to remain in full force, strength, and virtue; which being read and

 heard,

WINTER *against* GARLICK.

Pleads no award made by the arbitrators, but that the umpire did.

heard, the same *Edward* saith, that the said *Edmund* ought not to have or maintain his action aforesaid thereupon against him; because he saith, that the aforesaid *John Hind* and *John Packer*, the arbitrators in the condition aforesaid named, made no award, order, arbitration, conclusion, final end or determination of and in the premises in the said condition above-mentioned, at or before the eighth hour in the afternoon of the said nineteenth day of *August*, in the thirteenth year abovesaid, being the day of the date of the writing obligatory aforesaid: but the same *Edward* further saith, that the aforesaid *Robert Godfrey*, the umpire in the same condition likewise named, having taken upon himself the burthen of arbitrating of and concerning the premises in the said condition above specified, afterwards and before the eighth hour in the afternoon of the day next following the date of the writing obligatory aforesaid, in the same condition specified, to wit, at the eighth hour in the forenoon of the same day, at the city of *Bristol* aforesaid, in the county of the same city, made his umpirage in writing of and concerning the premises aforesaid, then and there ready to be delivered to the parties aforesaid in manner and form following; that is to say, that all suits at law then depending between the aforesaid parties should cease, and be no further prosecuted: and that the said *Edward Garlick* should pay to the said *Edmund Winter*, at the then dwelling-house of *Samuel Fitsall*, situate in *Castle-Street*, in *Bristol* aforesaid, the sum of ten shillings, and the costs of law which the said *Edmund Winter* had been at in that suit; and that after the payment of the said sum of ten shillings in manner aforesaid, they the said *Edmund Winter* and *Edward Garlick* should give to each other general releases of all actions, suits, controversies, and demands, from the beginning of the world to the nineteenth day of the then instant *August*, in common form: and the same *Edward* further saith, that after making the umpirage aforesaid, and before the day of exhibiting the said bill of the said *Edmund*, to wit, on the twenty-first day of *August*, in the thirteenth year abovesaid, at the said dwelling-house of the said *Samuel Fitsall*, situate in *Castle-Street*, in *Bristol* aforesaid, he the same *Edward* was ready, and offered to pay to the same *Edmund* then and there being present the said ten shillings, and to seal, and as his deed to deliver to the same *Edmund* a written general release of all actions, suits, controversies, and demands, from the beginning of the world unto the said nineteenth day of *August*, in the umpirage aforesaid mentioned, in common form; but the said *Edmund* then and there altogether refused to receive or accept the said ten shillings and the said written release from the said *Edward*: and this he is ready to verify: wherefore he prays judgment if the said *Edmund* ought to have or maintain his said action thereupon against him, &c.

The umpirage set forth, that the defendant should pay costs of suit.

Tender and refusal.

Replies and sets forth the cause of action, and levying a plaint.

And the said *Edmund* saith, that he, notwithstanding any matters by the aforesaid *Edward* above in his plea alledged, ought not to be precluded from having his said action thereupon against him,

him, becaufe he faith that the faid *Edward*, before the faid time of making the writing obligatory aforefaid, at the city of *Briftol* aforefaid, in the county of the fame city, and within the jurif-diction of the court of our faid late lord the king, held at his faid city of *Briftol*, before the mayor and aldermen of the fame city, falfely and malicioufly had faid and publifhed concerning the fame *Edmund* diverfe, falfe, feigned, fcandalous, and malicious words; and the fame *Edmund*, for the obtaining and recovering damages by occafion of the fpeaking and publifhing of thofe words, before the faid time of making the writing obligatory aforefaid, levied in the faid court of the faid late lord the king, held at the city of *Briftol* aforefaid, before the mayor and aldermen of the city aforefaid, a certain plaint againft the faid *Edward* of a plea of trefpafs upon the cafe; and thereupon fuch proceedings were had, that he the fame *Edmund*, at the city of *Briftol* aforefaid, in the county of the fame city, paid, expended, and laid out, in the profecution of the aforefaid plaint againft the faid *Edmund*, the fum of four pounds five fhillings and tenpence of lawful money of *England*; and thereupon the fame *Edmund* and *Edward*, for the determination of that fuit, and all other demands whatfoever, afterwards, to wit, on the faid nineteenth day of *Auguft*, in the thirteenth year of the reign of the faid late lord the king abovefaid, at the city of *Briftol*, in the county of the fame city, by their feveral writings obligatory, by each to the other of them mutually fealed and delivered, fubmitted themfelves to perform and fulfil the award of the aforefaid *John Hinde* and *John Packer*, or for want thereof the umpirage of the aforefaid *Robert Godfrey*, that is to fay, the faid *Edward* by his writing obligatory in the faid declaration abovementioned; and the fame *Edmund* in fact faith, that he the faid *Edmund* after the making of the umpirage aforefaid by the faid *Robert*, and before the day of exhibiting the faid bill of the aforefaid *Edmund*, to wit, on the faid twenty-firft day of *Auguft*, in the thirteenth year of the reign of the faid late king abovefaid, at the city of *Briftol* aforefaid, in the county of the fame city, did give notice to the faid *Edward*, that he the aforefaid *Edmund* in profecution of the faid fuit had paid and expended the aforefaid fum of four pounds five fhillings and tenpence, and then and there demanded that money of the faid *Edward*; and that the faid *Edward* at any time hitherto hath not paid the faid four pounds five fhillings and tenpence to the fame *Edmund*, according to the form and effect of the umpirage aforefaid: and this he is ready to verify: wherefore he prays judgment, and his debt aforefaid, together with his damages by occafion of the detention of that debt, to him to be adjudged, &c.

WINTER against GARLICK.

Averment of his expence in the fuit.

And their fubmiffion to the award by the faid bond.

Notice of his expences and requeft, and defendant's refufing to pay.

Demurrer and joinder.

Case 285.

Winter *against* Gailick.

An award that the party shall pay the costs of a suit *depending* in an inferior court, is void for uncertainty —*Sed qu.*

S.C 1 Salk 75. 2. Keb 231. 2. Vent 242. B. R. H. 181. 3. Atk (504). 519. Kyd on Awards, 88, 89 Stra. 1025 1. Com Dig. "Arbitrament" (A. 11.) 1. H Bl. Rep. 223. 2. Bl. Rep. 953

DEBT UPON BOND for performance of an award. The award was, that the defendant should pay the plaintiff ten pounds, and *the costs* of a certain suit before depending in an inferior court, and thereupon mutual releases.

Exception was taken, that the award was not *certain* nor *final*, nobody knowing what *the costs* were: and then it was not *mutual*, the releases being ordered upon payment of the ten pounds and the costs (*a*).

It was answered by stating the case of *Beale v. Beale* (*b*), where it is said, that *the costs* may be ascertained by the attorney's bill.

HOLT, *Chief Justice*. It has been held a good award to pay such costs as THE PROTHONOTARY should tax, and that carries it far enough; but surely they shall either ascertain it themselves, or refer it to a proper officer.

POWELL, *Justice*. That case referring to the officer of a court has been settled on debate, for *id certum est quod certum reddi potest* (*c*).

Et adjournatur.

(*a*) See Fintney *v.* Bullock, 2. Lev. 3. Lev. 413

(*b*) Cro. Car 383.

(*c*) An award that one shall pay to the other all such monies as he has expended about the prosecution of a suit, is good, Hanson *v.* Liversedge, 2. Vent 242 so "that the defendant shall pay as the "plaintiff and his attorney by bill or oath "shall make appear," Linfield *v* Fern, 3. Lev. 18 See also Rous *v.* Lun, 1. Keb. 569, Messenger *v* Freeman, 3 Keb 508., Blackwell *v.* Knipe, 3. Keb. 293. And if costs are awarded generally, but no person appointed to tax them, the Court may order THE MASTER to do it, Dudley *v.* Nettlefield, Stra 737. 2 Wils 268. although part or the whole of such costs be for business done in an *inferior court*, *Ex parte* Williams, 4 Term Rep. 496 But if the award order the costs to be taxed by a person who is not a proper officer for that purpose, it is void, Knott *v.* Long, 2 Stra 1025 B. R. H 181. But see Barnes, 43 B R H 161 Hullock on Costs, 414 Arbitrators, however, are not bound to refer the taxation of costs to the officer of the court, but they may award a gross sum for costs, Shepherd *v* Brand, B. R H 53.

Case 286.

Anonymous.

No demurrer in abatement. Salk. 298. 1 Salk. 93. 218. 220. 1. Show. 91.

HOLT, *Chief Justice*. There can be no such thing as a demurrer in abatement.

* Harvey *against* Broad. Case 287.

IT was now the question, Whether the Court ought to take notice of the mistake of the day, by being told of it *ore tenus*, and not assigned for error on *the record*?

If a *writ of enquiry* be made returnable *tres Trinitatis*, and the return day happen to be *Sunday*, it is bad, and cannot be executed on the *Monday*; and the Court will take notice of it, although not assigned for error on *the record*.

PENGELLY urged, that there was no reason they should; for the Court in their judicial proceedings never reckon by the days of the month, but by the days of the week, as *die Lunæ prox. post.* such a return, and relied on the case of *Morris v. Fletcher* (*a*), where a writ of inquiry was returnable *die Lunæ prox. post. quinden. Hilarii primo Caroli*, and the sheriff returned an inquisition before him the twenty-seventh of *January*, a day in truth after the writ was returnable, and yet the Court refused to take notice of it, being not assigned on the record (*b*).

BROTHERICK *contra* quoted *Cro. Jac.* 506. 548.

S. C. ante, 148. 159. S. C. 2. Salk. 626. S. C. Holt, 761. Ante, 41. 81. 160. Post. 250. 2. Keb. 59. Jones, 156. 1. Leon. 142. 328. 1. Jones, 301. Cro. Eliz. 227. Cro. Jac. 16. 12. Mod. 647. Fort. 373. Ld. Ray. 281. 870. 1557. 1066. 1. Bl. Rep. 526. 6. Com. Dig. "Retorn" (C. 1.). Sellon's Pract. 13.

HOLT, *Chief Justice*. You cannot say that the *Monday* is *tres Trinitatis*, for in truth it is the *Sunday*; but because *the essoins* cannot be kept on the *Sunday*, they are kept on the *Monday*, and yet the *Sunday* is one of the four days. At the *Council of Nice* they made a calculation moveable for *Easter* for ever, and that is received here in *England*, and become part of the law; and so is THE CALENDAR established by act of parliament (*c*). And can we take notice of a Feast, without telling what day of the month it is? or, Shall we take notice of it because you shew it on the record, and not when we see it as plainly without your telling (*d*)? In *the Entries*, the *teste* of the writ of covenant was after its return, and this did not otherwise appear to the Court, but by their own taking notice of it; and, contrary to *Coke's* report of it, it was not amended, but the judgment was reversed.

Et adjournatur.

And it being again moved in *Michaelmas Term*, THEY WERE ALL CLEAR that they must judicially take notice that *tres Trin.* was on a *Sunday*, and that *Gage's Case* (*e*) is full in the point, contrary to the report of it in 5. *Co.* 45. and so is the case of *Fish v. Brocket*, in *Plowden* (*f*), where a fine was reversed because one of the proclamations was on *a Sunday* (*g*).

(*a*) Cro. Car. 53.

(*b*) See the case of Courtney *v.* Phillips, where it was assigned for error on the record, 1. Lev. 196. and S. C. 1. Sid. 301. and the case of Morris *v.* Fletcher, Cro. Car. 53. is allowed to be law.—See also Plowd. 265. a. 266. b. 1. Roll. Abr. 524. pl. 5. Dyer, 181. pl. 52. 21. *Hen.* 6. fo. 13. pl. 4. Cro. Eliz. 227. Latch, 118. Sir Thomas Jones, 228.—NOTE *to former edition.*

(*c*) See the statute *de Anno Bissextili*, the 24. *Geo.* 2. c. 23.; 6. Com. Dig. "Temps" (B. 2.).; and Davy *v.* Salter, post. 250.

(*d*) See Gage's Case, 5. Co. 45.

(*e*) Coke's Entries, 250. Moor, 571.

(*f*) Plowd. 265. Dyer, 181.

(*g*) See the case of Swan *v.* Broome, 1. Bl. Rep. 496. and 526. S. C. 3. Burr. 1595.

Case 288. * Fanshaw *against* Morrison.

Scire facias upon a recognizance, stating, that they and either of them *acknowledged* to owe the sum of 40l. to be raised of the goods, &c. of them, and either of them, is good. 10. Mod. 306.

SCIRE FACIAS upon a recognizance by bail, setting forth, that they and either of them *recognovit* to owe the sum of forty pounds to be raised of the goods and chattels, lands and tenements, of them and either of them, upon condition, &c.

The *scire facias* was to shew cause why the said sum of forty pounds should not be raised of the lands, &c. of them and of either of them, with an averment, *quas quidem separales summas* of forty pounds, they or either of them did not pay.

WELLS insisted, that the *scire facias* was bad; for to levy forty pounds of the goods and lands of them and either of them was to levy two several sums of forty pounds, and that ought not to be; and relied on the case of *Parry v. Villars (a)*, where judgment was to recover *separales summas*, the recognizance being as here, and judgment reversed. And he said, that it was impossible for two to be jointly and severally indebted in one individual sum, though they may be jointly indebted, and bind themselves jointly and severally to the payment; and therefore the common form of bonds by two are, "NOVERINT UNIVERSI, &c. *nos teneri*," so making a *joint lien* for the debt, which, as to the obligation of payment, is distributed and made several by the "*ad quam quidem* "*solut. obligamus nos et utrumque nostrum, &c.*"

HOLT, *Chief Justice*, remembered, and agreed the case of *Parry v. Villars*, but said, that by the words here one sum was only payable, but leviable upon the goods and lands of them both, or of either of them, at the party's election. And he said, there was this difference between *a bond* jointly and severally, and *a recognizance* so; that upon the bond you cannot sue both jointly and severally, but upon a recognizance you may.

Et adjournatur.

See the resolution in *Hilary Term*, in the third year of *Queen Anne (b)*.

(*a*) 12. Mod. 303. 1. Salk. 208. 2. Salk. 520. 2. Ld. Ray. 1138. that any judgment was given upon *the point* stated in the above report.

(*b*) It does not appear in any of the reports of this case, ante, 157.

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Case 289. * Elmore *against* Tucker.

If a *lessor* be bound to repair fences, he cannot distrain the cattle of a *stranger* that have strayed into the land by reason of his neglect to repair them.—Hob. 265. 2. Saund. 282. 289. Carth. 122. 179. 186. 3. Com. Dig. "Distress" (B.).

IN REPLEVIN, conuzance was made as bailiff to *J. S.* for rent upon a demise by the said *J. S.* of the *locus in quo*. It was pleaded in bar, that *J. S.* whose fee it was, time out of mind used, and ought, to repair and maintain the fences between the place WHERE and the plaintiff's land next adjoining, and through want of repair the plaintiff's cattle escaped into the place WHERE, and were distrained for the rent; and on demurrer,

EYRE,

EYRE, *for the demurrer*, relied on the case of *Pool v. Longville (a)*, the very case. Edmore against Tucker.

HOLT, *Chief Justice*. I think it is hard to maintain that judgment, that when the plaintiff's inheritance is charged with the repairs, he should take advantage of his own wrong in not repairing, by making the escaping cattle a distress for his rent; and it is not like the case of lord and tenant there quoted, for the lord has nothing to do with the land, but the charge of repairs belongs to the tenant *(b)*.

PER CURIAM. That judgment is fit to be re-considered.

Ideo adjournatur.

(*a*) 2. Saund. 282. 289.

(*b*) An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the *occupier*, and not against the owner of the fee, who is not in possession, Cheetham v. Hampson, 4. Term Rep. 318.

Docmanny *against* Davenant. Case 290.

There cannot be a *demurrer* to a plea in *abatement*.

S. C. 1. Salk. 220. Ante, 195. Skin. 620. Carth. 88. 1. Show. 70. 91. 5. Mod. 133.

THE DEFENDANT demurred *in abatement*, and the plaintiff joined *in bar*; and *judgment final* was given for the plaintiff.

THE COURT said, they knew not what A DEMURRER *in abatement* was; for if the cause be apparent to the Court, they will abate the writ, &c. themselves, or else it ought to be pleaded. And they said, that they would turn all such *demurrers* into *bars*.

Though EYRE, *Justice*, quoted the case of *Wimbish v. Willoughby* (*a*), a precedent (*b*) of a demurrer in abatement.

10. Mod. 170. 1. Ld. Ray. 20. 393. 2. Ld. Ray. 1021. 1056. 1483.

(*a*) Plowden, 73. 2. Roll. Abr. 668.

(*b*)

Lepiot *against* Browne. Case 291.

If there be father and son of the same Christian names, a declaration against *the son in custodiâ mareschalli* is good, without distinguishing him by the addition of *junior*.

S. C. 1. Salk. 7. S. C. Holt, 41.

BROWNE being removed by *habeas corpus* into the custody of THE MARSHALL, the plaintiff declared against him by the name of *J. Browne*, of such a place, *in custodiâ mareschalli*; and he pleaded in *abatement*, that his father lived in the same town, and that his name was *J. Browne* too, and concluded in *abatement*, for the want of the addition of *junior*, or some other, to distinguish him from the father.

And though this was *by bill*, and so not within the *statute of Additions*, yet by the common law there ought to be *an addition* to distinguish in this case of the son; otherwise if the father were

2. Inst. 670. Hob. 330. Stiles, 394. 2. Roll. Rep. 225. Comy. Rep. 260. 1. Viner, "Addition" (N). 1. Com. Dig. "Abatement" (F, 21.). Ld. Ray. 304.

sued,

LEPIOT *against* BROWNE.

sued, for then *J. Browne* without * addition will be taken for the father; and the being in the custody of THE MARSHALL shall not help it:—FIRST, Because there is no description of the person. – SECONDLY, Because the father may be there too. And he quoted the authorities cited in the margin (*a*).

HOLT, *Chief Justice.* Suppose *father* and *son* be called *John Stiles*, and one by will devises his lands to *John Stiles*, this *primâ facie* shall be understood *the father*; but if it be made out, that the devisor did not know the father, &c. the son shall take; *quod fuit concess.* And suppose one deals with *the son*, and knows nothing of *the father*; shall he, at his peril, take notice that he has a father of the same name, &c.? Indeed, the defendant, by bringing the *habeas corpus*, had concluded himself, if you had relied upon it.

Vide 11. Co. 89. 2. Keb. 182.

If this were *an original*, and the father and son had lived in different counties, there had been no occasion for the addition of *junior*.

And PER CURIAM, You should have also said, that the father was *in custodiâ mareschalli* too.

And therefore *respond. ult. nisi* before end of Term.

But the last day PENGELLY speaking to it again, let it go over.

(*a*) Year Books 33. *Hen.* 6. pl. 55; the 37 *Hen.* 6. pl. 29. b pl 30 a.; the 4. *Edw* 3. pl. 31.; the 8. *Edw.* 3. pl. 50.; the 21. *Hen* 6. pl. 26. b.; the 5. *Edw.* 4. pl. 25 a, and Rastal's Entries, 310.

Case 292. Adams *against* The Terre-tenants of Savage.

On a *scire facias* against *terre-tenants*, without naming them, if it be pleaded in abatement that *A.* is a *terre-tenant*, and not summoned, the defendant shall not *answer over* until *A.* be summoned, but the writ shall not be abated.

S. C. ante, 134. S. C. post. 226. S. C. 1. Salk. 40. S. C. 2. Salk. 601. 679. S. C. 3. Salk. 331. S. C. Lilly Ent. 398.

SCIRE FACIAS was brought to summon in the terre-tenants of *Savage*, not naming them.

To this it was pleaded in *abatement*, that *J. S.* was *a terre-tenant* not summoned, and concluded, *quod breve cassitur*;

Whereas the true way had been to conclude, *si respondere debeat quousque*, and thereupon to take a new writ to summon in that *terre-tenant*.

ALL THE COURT took a difference where the writ is general, and where it goes about to name the *terre-tenants* particularly, and omits one: in the latter case, the writ may be abated, for there the party may have a better writ of the kind, *viz.* one naming them all; but in the first case he cannot.

And therefore WE cannot give judgment to *quash* the writ, but only that he shall not be put to answer until the other be summoned.

But because DARNELL, *Serjeant*, urged, that he had a multitude of precedents to the contrary, they gave day to shew them (*a*).

Adjournatur.

1. Keb. 351. Carth. 111. Skin. 273. 12. Mod. 407. 499. Cowp 728.

(*a*) For precedents of such conclusions as here, see Co. Ent. 604. Cliff. Ent. 702. Cro. Jac. 506. Cro. Eliz. 740. Moor, 524. 1. Keb. 55. 310. 351 Carth. 363. Bohun's Just. Leg. 512. 523.—NOTE *to former edition.*

Harwood

* Harwood *against* Turberville. Case 293.

THE DEFENDANT borrowed money for the use of his mother, and obliged himself by bond to the payment of it, on all demands, if his mother would not pay.

If a son borrow money for the use of his mother, and give a bond to pay it *on demand*, and his mother do not pay it, THE OBLIGEE may declare on this bond against THE OBLIGOR, without stating any *special request* to the mother to pay the money.

And now in debt upon this bond, and *oyer* thereof, he demurred to the declaration, because there was no *special request* with time and place of the mother; and *licèt sæpiùs requisitus* would not do; for, as it was said, the defendant owed nothing until want of payment by the mother, and no fault could be in her, there being no demand.

PER CURIAM. When there is a duty which the law makes payable on demand, there needs no demand expressly laid; but where there is no duty until demand, it is otherwise; and here was a duty *ab initio*. If a man be bound to pay money on default of payment by another, but is not the original debtor, there he is not chargeable until *special request* made of him who was to pay it.

Post. 260. 227. 2. Salk. 457. Carth. 268. 1. Lev. 3. 45. 77.

JUDGMENT was given for the plaintiff.

Raym. 27. 1. Sid. 105. 456. 1. Mod. 35. 2. Mod. 285. 2. Saund. 66. 78. 10. Mod. 519. 12. Mod. 413. Ld. Ray. 596. 1095. 1140.

Walmsley *against* Russel. Case 294.

THE PLAINTIFF IN THE CASE declared, that he is a man of reputation, free from all perjury and subornation of perjury; and that he is, and for six months before the words spoken was, a *justice of peace*, and is, and for several years before was, chancellor of the consistory-court of the *Bishop of Coventry and Litchfield*; and writs did issue such a year for calling a parliament, and that such a day in that year was appointed for the election of burgesses for *Litchfield* to serve in the said parliament; that the plaintiff intended to stand as candidate, and of such his intention gave public notice; that the defendant knowing the premises, to disparage the plaintiff in his credit and reputation, and to bring him under the penalty of perjury, and subornation of perjury, at such a time and place, in hearing of several of the queen's subjects, and in the presence of the plaintiff, spoke of him, the plaintiff, these false and scandalous words: "*There goes your rare chancel-*" "*lor*," *innuendo* the plaintiff, "*to suborn witnesses to swear against* "*the parson*;" whereas the plaintiff was not guilty thereof. Verdict and damages for the plaintiff.

Quære, Whether to say of the chancellor of a diocese, "There "goes your rare "chancellor, to "suborn wit-"nesses to swear "against the "parson," is actionable.

S. C. 2. Salk. 696. 3. Co. 191. 1. Lev. 280. 535. 3. Lev. 50. 7. Mod. 107. Carth. 330. Skin. 98. 112. Ld. Ray. 236. 710. 812. 1369. 12. Mod. 98. 514. 8. Mod. 270. 10. Mod. 196. 11. Mod. 193. 220. Comy. 262. Stra 420. 617. 1157. 1168. 1. Com. Dig. 253.

GOULD, *Justice*. The action well lies. If the words were simply and abstractedly spoken, without reference to any public employment or office of the plaintiff, the case would have been more doubtful, though I will not give any opinion even in that case; but here they are spoken in reference to his *office of chancellor*, and of one that was then in *commission of the peace*, and stood

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stood candidate for a * *member of parliament*; and in that respect they are as reproachful as can be: they wound his reputation, and craftily obstruct his election. It has been objected, that they are not spoke with reference to his office. But I answer, they are; for they are spoken of one in an office of trust, and having administration of justice, and spoken expresly in that capacity, "*There goes your rare chancellor.*" And it cannot be taken here that the word "*chancellor*" was only meant for a description of the person, but rather an indication of the capacity in which he did suborn the witnesses: and it is not material to shew, that any woman did swear against a parson before him; for if there did not, then the greater falsity and scandal, and the word "*subornation*" is always taken in an ill sense (*a*). The case of *Harris v. Dixon* (*b*) has been objected, where the words were, "Thou hast procured *J. S.* to come thirty miles to commit "*perjury* before the *Lord Bishop of Winton*, and gave him so much "money;" and resolved that the action would not lie, because it was not said, that they did commit perjury; and therefore no offence. I answer, that this very case was adjudged actionable (*c*). In the case of *Prowse v. Carey* (*d*), "Thou hast procured false "witnesses to swear in such an action," were held actionable; for it shall be intended *in malam partem*. In the case of *Sir John Kirle v. Osgood* (*e*), "He is a forsworn justice, and not fit to sit on the "bench," spoken of a justice of peace, was held actionable. And words are to be taken according to their general acceptation; and the general acceptation of these words cannot be otherwise than criminal. In the case of *Sir J. Isham v. York* (*f*), "I have often "been with *Justice B.* for justice, but could get nothing but "injustice at his hands," was held actionable; and it shall not be intended of any demand of private justice. Besides, these words are spoke of one who designed to stand for *parliament-man*, and with intent to hinder his election; and he quoted the case of *Sir Walter Clarges* (*g*). To say of a man, that "he is a papist," though words not actionable in themselves, yet they were adjudged actionable, because spoke of one who stood for *parliament-man*. The like judgment in one *Stowell's Case* (*h*) since, where "You and "your crew brought the late king to death," were held actionable; though it might be said, that they only attended him to the place of execution: yet because the words sound in scandal, and that the common acceptation and construction of them must be, that they were concerned and busied in bringing the king to death, he oncluded for the plaintiff.

* Yelv. 72. acc. Sed Cro. Car. 337. Cro. Jac. 151. con. See Skinner, 183. 364. Carth. 330. 400. 498.

POWYS, *Justice*, doubted how it would be if the words had no relation to his office, or were spoken of a man not in office; but he held them actionable here for these two reasons, *viz.* that they were

(*a*) 3. Inst. 167.
(*b*) Yelv. 72. 1. Roll. Abr. 51.
(*c*) See the report of this case, Cro. Jac. 158.
(*d*) Cro. Eliz. 93.
(*e*) 1. Vent. 50. S. C.
(*f*) Cro. Car. 15.
(*g*) Raym. 482. 3. Lev. 30. 3. Mod. 26. Skin. 68. 88. 1. Freem. 280.
(*h*) Hardres, 103.

spoken

ſpoken of a *public officer*, and in reference to his office; for he held, that the word "*chancellor*" was not a *deſignatio perſonæ*, or as his name, as *parſon* or *dean* is, but an *innuendo* of his corruption *quatenus* ſuch, I. E. *quatenus* a chancellor. And he denied the caſe in 1. *Roll. Abr.* 79. *p.* 2. but agreed the caſe of *Skinner v. Trobe* (*a*), "Thou art forſworn in *Collet-Court*," and *Page v. Keble* (*b*), "* Thou art perjured, for thou art forſworn in the "*Biſhop of G.*'s court," not to be actionable; and would diſtinguiſh thoſe caſes from this, becauſe ſpoken here of an officer, and with relation to his office. "*Subornation*" is a known term in the law, and is the word of art for corrupting one to commit perjury (*c*). The ſtatute of 32. *Hen.* 8. c. 9. ſpeaks of ſubornation of witneſſes; the ſtatute 5. *Eliz.* c. 9. ſubornation of falſe procurement of a witneſs. In the caſe of *Pugh v. Owen* (*d*) theſe words ſpoken of a juſtice of peace to his ſervant, "Your maſter's witneſſes "(in ſuch a cauſe) were perjured, and your maſter is a maintainer "and upholder of them," were held not actionable by RAINSFORD and TURNER, *Barons*, againſt HALE, *Chief Baron*, becauſe they did not relate to his office of juſtice, but were ſpoken as of a private perſon. And in *Moor* (*e*), ANDERSON, *Chief Juſtice*, ſays, A private man cannot be ſlandered but by particular words, but general words ſuffice to ſlander a magiſtrate. And he concluded for the plaintiff.

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* [202]

Vide Cro. Jac. 158. 1. Danv. 107. 153.

POWELL, *Juſtice*, *contra*. FIRST, He agreed, that the phraſe of expreſſion was as direct as if the defendant had actually ſaid, that the plaintiff had ſuborned witneſſes to ſwear againſt the parſon. I cannot well find, whether my brothers think the words actionable in themſelves, if ſpoken of any perſon whatever, or by reaſon of a relation to his office, or other circumſtances of the plaintiff on the declaration; but I hold them not actionable upon any account without a relation to his office. A perſon cannot be a ſuborner of perjury without there be a perjury committed. One indeed may ſuborn to ſwear, and yet no oath be taken; or an oath may be taken, and yet it may be no perjury, for it does not appear to be in any court of juſtice. The caſe of *Skinner v. Trobe* (*f*) is not like this, for here is neither court or cauſe mentioned where the ſwearing was. He agreed the caſe of *Harris v. Dixon* (*g*), for there was a perjury ſaid to have been committed. And as to the caſe of *Pugh v. Owen*, a perjury is likewiſe charged. It is not actionable to ſay, that one did forſwear himſelf; *à fortiori* how can the ſuborning one to forſwear himſelf be ſlander to bear an action? Subornation *ex vi termini* does not import a ſubornation of perjury; and the caſe in *Roll* (*h*) is much ſtronger than this. Subornation indeed is never taken in a good ſenſe, no more is forſwearing, yet no action lies for ſaying a man did forſwear himſelf. Then as to the relation of

1. Vent. 59, 60.

(*a*) Cro. Jac. 190.
(*b*) Cro. Jac. 436.
(*c*) 3. Inſt. 167.
(*d*) Hard. 501.
(*e*) Moor, 243.
(*f*) Cro. Jac. 190.
(*g*) Cro. Jac. 158.
(*h*) Anonymous, 1. Roll. Rep. 79.

theſe

[illegible] Ruska. [illegible]-Jac. 143.

these words to his office, or that he alledges himself to be a *justice of peace*, and candidate for *parliament*: I agree, words spoken of a magistrate will bear action that would not do so if spoken of another, but they must touch him in his office. If there had been a case in which a parson had been party before the plaintiff, and women had been sworn in it, and that had been set forth, then these words might be applied by *innuendo* to that, and therefore actionable (*a*). But the word "*chancellor*" does not necessarily import, that this was charged upon him in his *office of chancellor*. Words must be either actionable in their own nature, and bear an action if spoke of anybody, or they must scandalize him in office, &c. to bear an action.

[203] * HOLT, *Chief Justice*, *accordant*. My brothers for the plaintiff are not well agreed, whether the words are actionable in themselves, but rather incline that they are not; and I think they have great reason for that opinion, because here is no charge upon the plaintiff of any subornation of perjury, or that he did suborn witnesses to forswear themselves. Suppose it were the first, and no *colloquium* of any cause, or court where there had been an oath, it would not be actionable; nor is there any precedent for it, and there is reason that it should not. To say a man has forsworn himself is not actionable; therefore to say that he has suborned witnesses to forswear is not. But the words are not so strong in this case; for they are, that he did suborn witnesses to swear. Surely the suborning of witnesses to swear is no crime, for suborning *ex vi termini* is not a crime otherwise than as it relates to perjury; and suborning witnesses to swear does not imply that they do swear. The case in 1. *Roll.* 79. lays a *colloquium* of a suit in chancery, and of witnesses sworn there; so that first one would think here was a subornation of perjury; and the words go farther, and say, that he would sue in THE STAR-CHAMBER for it, a proper court to punish perjury in, yet it was held not actionable. Then how do these words touch him in his office? If a chancellor will suborn witnesses to swear, does this relate to his office? If he do it in another than in a spiritual court, it cannot; if it be in a spiritual court, it may not be before himself: in short, it does not appear to have been before himself, and we must not intend it to maintain an action. And the naming him "*chancellor*" is no more, and so commonly understood, than a *designatio personæ*, as *Mr. Chancellor*. To make words actionable in themselves, it is necessary to charge some scandalous crime by them. If a communication had been laid concerning an oath which a man had taken in a court of justice, and that the man did forswear himself, that had been charging him with perjury, and therefore actionable. But barely to say, that a man did forswear himself, or suborn another so to do, is not charging an offence punishable, and therefore not sufficient to ground an action. And he concluded for the defendant.

(*a*) Cro. Jac. 30. Yelv. 220.

And

indictment; and the case of *Dyer*, 114. was quoted, where A FILAZER was removed by the Court by *parol*. THE QUEEN *against* BAINES.

But PER CURIAM, Not like this, for that amoval is not peremptory, but the cause may after come in question upon *an assize*; but this amoval is made final by the statute.

So THE COURT being clear for quashing it, THE ATTORNEY-GENERAL moved to quash the *certiorari*.

Wey *against* Yally. Case 283.

DEBT FOR RENT upon a demise of lands in *Jamaica*, brought in *London*, and plea to jurisdiction of this court, that there are courts of record there, in which all actions concerning lands there are determinable; and prays judgment, if this court has jurisdiction: and demurrer.

Debt for rent may be brought by a *lessor* against a *lessee* in the courts at *Westminster*, on a demise of lands in *Jamaica*; for the action is, in this case, on the *privity of contract*, which is transitory, and not on the *privity of estate*, which is local.

BROTHERICK, *in maintenance of the plea*, quoted the case of *Parker v. Damer* in this court (*a*), that debt does not lie here for rent against the assignee of a term in *Ireland*. And in the principal case, if the defendant had a good local plea, as an entry and ouster made by the lessor, such a plea would want trial here; and quoted for this 3. *Keb.* 150. where debt was brought for rent upon demise of lands in *Ireland*, and it was pleaded that the *Duke of York* was seised in fee of the lands, and entered, and ousted the lessee, and issue there upon the entry and ouster; and by HALE, it is bad, because the issue could not be tried here. And he said, in the principal case his client was at that disadvantage; for the house demised was casually burnt, and by an act of the State of that country ordered never to be rebuilt, and a reparation made to the lessor; and we cannot have benefit of this matter in evidence here, because the jury cannot enquire of it; and the plaintiff is at no mischief, for if he has not justice there, he may have a writ of error hither.

S. C. 2. Salk. 651.
S. C. 3. Salk. 381.
S. C. Holt, 705.
Post. 228.
Cro. Car. 183.
W. Jones, 63.
Latch, 197.
2. Lev. 80.
1. Lev. 143.
1. Saund. 238.
Hob. 37.
1. Cro. 143. 183. acc.
7. Co. 2.
1. Jo. 43, 44.
1. Vent. 59.
Tidd's Practice, 11.
2. Stra. 776.
2. Com. Dig.

HOLT, *Chief Justice*. Your case of *Parker v. Damer* is good law; for being brought against the assignee, it is grounded upon the *privity of estate*, which is local, and therefore to be brought where the land lies; but if it had been by the lessor against the lessee, or by the assignee of the reversion, debt or covenant upon the statute 32. *Hen.* 8. c. 34. it were otherwise, for then it might be upon

1. Bac. Abr. 34, 35. 1. Wils. 165. 3. Wils. 25. 4. Mod. 71. 3. Burr. 1271. 2. Com. Dig. "Covenant" (B. 3.). (C. 3.). Dougl. 187. Cowp. 176. 2. Term Rep. 238. 3. Term Rep. 193. 584. 4. Term Rep. 504.

(*a*) Hilary Term, 1. & 2. *Will.* & *Mary*, Roll 505. reported 3. Mod. 336. 1. Show. 187. 1. Salk. 80. and Carth. 182.

 the

WEY *against* YALLY.

the *privity of contract*, * which is transitory, and therefore might be laid anywhere: If a deed bear date at a place certain, the action thereupon must be laid there. And it has been held, that if a local issue arise in *Ireland*, in an action laid here in *England*, it shall be either tried in the county where the action is laid, according to *Dowdale's Case* (*a*), or by suggesting that such a place in such a county is next to *Ireland*, and have jury from thence. And here the defendant, upon *nil debet*, may give entry, &c. or the law of the country in evidence, if there be such a law; and this we see every day done before committees of appeals from thence.

POWELL, *Justice*. The diversity appears plain between *local* and *transitory* actions. If a deed bear date out of the kingdom, if the place of the date be not alledged somewhere in *England*, we cannot try it; but here the action is grounded upon the contract, which follows the person where-ever he goes. And if the defendant had pleaded a local plea, it might be tried where the action is brought, or by suggestion, as MY LORD says, in the next place, whereof we have precedents in cases from *Ireland*. And there may be a law in *Jamaica* against bonds, yet sure that will not confine the action of debt upon bonds made there to that country. And an action of false imprisonment has been brought here against a *governor of Jamaica* for an imprisonment there, and the laws of the country given in evidence.

Hob. 233. Cro Jac. 76 2. Inst. 261 b.

See Fabrigas v Mostyn, Cowp 161.

And by THE WHOLE COURT, a *respondeas ouster* was awarded. *

(*a*) 6 Co 46

Case 284. Winter *against* Garlick.

Declaration upon arbitration-bond.

S. C 2 Salk. 797

CITY OF BRISTOL, *to wit*. } BE IT REMEMBERED, that heretofore, to wit, in the Term of *Easter* last past, before our lady the queen at *Westminster*, came *Edmund Winter*, by *Richard Langford* his attorney, and brought into the court of the said lady the queen then there his certain bill against *Edward Garlick*, otherwise called *Edward Garlick*, of the *City of Bristol*, apothecary, in the custody of the marshal, &c of a plea of debt; and there are pledges of prosecuting, namely, *John Doe* and *Richard Roe*, which said bill followeth in these words, that is to say, *City of Bristol*, to wit, *Edmund Winter* complains of *Edward Garlick*, otherwise called *Edward Garlick*, of the *City of Bristol*, apothecary, in the custody of the marshal of the *Marshalsea* of the lady the queen, before the queen herself, being of a plea, that he render to him one hundred pounds of lawful money of *England*, which he oweth to him and unjustly detains, for that, to wit, that whereas the said *Edward*, on the nineteenth day of *August*, in the thirteenth year of the reign of our lord *William the Third*, late *King of England*, &c. at the city of *Bristol*, in the county of the same city, by his writing obligatory, sealed with the seal of him the said *Edward*, and shewn to the court of the lady the queen now

And THE COURT being thus divided, the question was about the judgment. If a rule be made for a cause to stay until the Court be further moved, and the Court is divided, there needs no new rule from the Court, and the plaintiff without more may enter judgment upon the verdict. But if the case be ruled to be put in THE PAPER for argument, or the last rule be a *Curia advisare vult*, and the Court be divided, there can be no judgment: and the case of *Ivefon v. More* (a) stands upon that point to this day.

How judgment may or may not be when THE COURT is divided.

(a) 1. Salk. 15. S. C. Com. Rep. 58. S. C. 1. Ld. Ray. 486. S. C. Carth. 451.

* [204]

* The Queen *against* London.

Case 295.

AN ORDER for payment of *labourers wages* recited the special matter thus:

An order of justices made on the 5. *Eliz.* c. 4. to pay the wages of a person employed by an overseer of the king's works in daily garden work in the garden at *Hampton-Court*, is bad; for justices have only authority with respect to *wages in husbandry*; and it appears on the face of this order that the party was a *journeyman*: but if an order be made for the payment of *wages generally*, the Court will intend it for *wages in husbandry*.

' Two persons were retained by the defendant, being overseer of the works of the king's garden at *Hampton-Court*, at so much a day, and employed in garden work there; and the order was made to enforce the payment.

The order was removed by *certiorari* from HICKS'S-HALL.

IT WAS NOW MOVED *to quash it*. For the justices have no power by the statute of 5. *Eliz.* c. 4. to order payment of the wages of *a coachman*, *footman*, or any other *labourer* or *servants*, but such as are *labourers in husbandry*: they cannot make orders upon *bricklayers*, *carpenters*, &c. works; but in case of *servants in husbandry*, where the justices may settle their wages, and force them to serve by the act of parliament, they may compel payment; and the justices have power to regulate wages in abundance of cases where they cannot compel payment; and the case of *The Queen v. Corbet* here before (a), and *Fitz. N. B.* 168. *Bro. tit.* "*Labour*," were quoted, and this distinction was taken. If the order had been generally for *wages*, there the Court would not intend it to be other than *wages in husbandry*, and it might hold; but where on the face of the order it appears otherwise, as here it does, it is in itself void, as touching a matter whereof they have no jurisdiction; and indeed it does not appear that this was for wages settled by justices, and they never did pretend to a jurisdiction but where the wages was settled by them. Then this is a question of jurisdiction, and acts of parliament concerning jurisdiction ought to be taken strictly, and all the matter of equity that may be urged on the other side is shut out by this one answer, that it is against a positive law.

S. C. 3. Salk. 261.
S. C. 2. Salk. 442.
S. C. Sett. & Rem. 231.
Skinner, 8c.
Dyer, 265 a.
Jenk. 135.
9. Co 48.
Moor, 898.
1. Browal. 64.
2. Jones, 47.

BROTHERICK *contra*. This jurisdiction has been exercised by them ever since the making of the statute, which is a great argument of right. He quoted *the King and Queen v. Jammer* (b),

5. Mod. 419. Carth. 156. 1. Stra. 2. 8. Fortes. 317. 2. Stra. 1002. Ld. Ray. 820. 1390. 4. Com. Dig. "Justices of Peace" (B. 60).

(a) Ante, 91.

(b) Easter Term, 3. *Will.* & *Mary.*

where

The Queen against London.

where it did not appear to have been a service in husbandry; and there it was held, they could enforce their order by commitment; and he insisted, that work in a garden was a service in husbandry; and they have always been allowed a jurisdiction of that case: and taking the several clauses of the statute together, they necessarily intend to give remedy by the justices in all cases of this kind. By 5. *Eliz.* c. 4. s. 7. and 15. they are to fix and settle wages and day-hire of labourers, and so of apprentices in husbandry. By 5. *Eliz.* c. 4. s. 14. a party retained shall not go, if he be duly paid, till the work be finished, under penalty of a month's imprisonment, to be inflicted by the justices. By 5. *Eliz.* c. 4. s. 18. they are to convict masters for keeping contrary to the act. By 5. *Eliz.* c. 4. s. 37. all justices are required to make special and diligent inquiry into the breaches made of any of the branches of this statute. If then by this statute they are to ascertain wages and day-hire, to examine and punish masters that

* [205] give more, or servants* that will take more, than the established rate, if a servant cannot quit his master without leave, but that they may punish him, and that all offences contrary to this act are determinable by the justices, Why shall not they, by virtue of those comprehensive words, compel payments of such servants and labourers wages?

Holt, *Chief Justice.* Two questions may well arise here.—First, Whether the defendant be bound to pay those wages at all? for if he be employed as *a surveyor* of this work, and bring in others, and agree with them, it may well be that he shall be chargeable by them: as if I put out cloth to a taylor, and he employs journeymen to make it up, he, and not I, shall pay them, and he by me is to be paid for the whole work. It may be, on the other hand, that the contract was not made by the defendant upon his own credit, but upon the credit of the crown; and neither appears on the order, but it only says that the retainer was by him.—Secondly, Suppose the contract be with him, and upon his credit, Whether *a gardener* working for day-labour in a garden be within the power given to the justices in point of payment of his wages? And what sticks with me is, why they should have power over wages and day-labour in husbandry, and not in cases of other labourers. You say, that it is, by implication, the same, because of the powers given to them by the statute over such labourers. And he remembered an order made upon my *Lord Offulston*, for his coachman's wages, which was quashed; and said, Surely they cannot order a journeyman taylor his wages or hire; and their having exercised this jurisdiction all along will not make it legal, if without foundation; and in that respect it is not like a suit in the admiralty for *seamen's wages*, for that may stand upon this reason: The admiralty is a court time out of mind, and it may be by ancient custom they have jurisdiction over seamen's wages; but this here is a jurisdiction set up within the memory of man. Ecclesiastical courts have jurisdiction of wills and testaments, not by *commune jus*, but by prescription, and no act of parliament

parliament is to give them jurisdiction. But it is said in *Hensloe's Case*, and so in *Selden*, that it was given to them by the laws of the kingdom, and it is not so any where but in *England*: so since the case of *seamen's wages* was always determinable in the admiralty, we must now understand that it had a legal commencement. The Queen against Lonsdale.

And at another day, the order was quashed PER TOTAM CURIAM, for that it appeared upon the face of it not to be for *labour in husbandry* (*a*). But if that had not appeared so, we would perhaps intend it *husbandry* (*b*); but now there is no room for such an intendment.

(*a*) See the statute 20 *Geo.* 3 c. 19. (*b*) But see Rex *v.* Helling, 1. Strange, 8. recited in the case of Rex *v.* Pope, 6. Mod. 419.

* [206]

* Carleton *against* Mortagh.

Case 296.

Michaelmas Term, 2. Anne, Roll 76.

ERROR OF A JUDGMENT in debt by confession in the common pleas. The *want of an original* was assigned for error and certified. The defendant pleaded *a release*, but no *venue* was laid; whereupon the plaintiff demurs.

If a writ of error be brought on a judgment in the king's bench, and the *want of an original* be assigned for error, and the defendant plead *a release of errors*, but do not lay *a venue* where the release was made, the plea is, for this reason, bad on demurrer; but THE COURT may award a CERTIORARI *ad informandum conscientiam Curiæ* whether there was *an original* or not, in the same manner as after "*in nullo* "*est erratum*" pleaded; but the defendant cannot demand this writ.

The great question now was, Whether the Court, being informed that there was *an original* below, could by law award a *certiorari ad informandum conscientiam Curiæ* before they reversed a judgment for a just debt?

GOULD, *Justice*. We may do it; and this case stands upon its own foot, and distinguished from other cases. In all cases where the Court after demurrer over-ruled against the defendant, or ruled for a plaintiff in error, or let in to examine the record for error before reversal of the judgment, they ought to award a *certiorari* to have the whole record below before them, though now the defendant cannot of right demand it; for notwithstanding any confession or other plea of the defendant admitting error, yet if no error appear to the Court on examination of the record, they shall affirm the judgment. "If a fact be pleaded in bar of "error, as a feoffment or release," says THE YEAR-BOOK of *Edward the Third* (*a*), "and issue is taken thereupon, and found for the "plaintiff," which is this very case, "yet the Court shall examine the "judgment; and if no error appear to them therein shall affirm it." And though error be assigned in the want of an original, yet since there may be an original below, the Court, upon their examination of the record, cannot be barred from awarding a *certiorari* to be

S. C. ante, 113. S. C. 1. Salk. 268. S. C 3. Salk. 399 S C Holt, 275. S. C. 2. Ld. Ray. 1005. Post. 235. Noy, 83, 84. Lat. 152. 1. Sid. 39. 1 Lev. 99. 1 Keb. 225. Farest. 204, 1. Show. 213. Ante, 113. 134. 174. Carth. 70. 200 330. Post. 235. 8 Mod. 31. 327. 331. 10. Mod. 318. 12. Mod 320. Stra. 765. 819. 5. Com. Dig "Pleader" (B. 13.). (6. B. 19.). Stra. 440. 3. Peer. Wms. 315.

(*a*) 21. *Edw.* 3. pl. 54.

CARLETON against MONTAGUE.

certified thereof. It is true, formerly, as appears by 28. *Hen.* 6. *pl.* 10. it has been held, that after "*in nullo est erratum*" pleaded the Court would and ought not to inquire farther, and that the whole record must be presumed to be laid before them, but since that time the Books are very full, that after "*in nullo est erratum*" pleaded, though a wrong original be certified, the Court may be informed that there is a right original, and they *ex officio* ought to award a *certiorari* for it to affirm the judgment (*a*), as in *Bishop's Case* (*b*), which in truth was after a *nil dicit et remanet indefens.* though *Coke* (*c*) reports it to be after *in nullo est erratum.* And this I take to be a strong authority for me, for the release in our case does not confess more than that does, and yet there the Court granted a *certiorari.* In some Books, it is said to be discretionary in the Court to do it or not; and if so, can we have a better motive of our discretion than here to affirm a judgment for a just debt, where a release of error is unfortunately ill pleaded? And he concluded for a *certiorari.*

POWYS, *Justice*, *accord.* It has been held formerly, that "*in nullo est erratum*" was a demurrer on what was produced of the record; but in 9. *Edw.* 4. 32. *b.* it was adjudged, that the Court may at discretion send a *certiorari* after *in nullo est erratum*
*[207] pleaded; and *Bishop's Case* allows that, and *Jo.* 140. * and *Latch*,
1. Leon. 22. 152. that after the plea pleaded the party cannot pray a *certiorari*,
Noy, 83, 84. and if he do it shall not go at all; and the entry ought to be that it
1. Sid. 109. was "By the Court," and not at prayer of party: and there is no
Vide 1. Co. 36. difference between this and *in nullo est erratum* in point of reason, for
. Co. 37. one is matter of law, and the other matter of fact: And why should it be when the issue in law is against him, and not when the issue in fact is? And in those Books it is said, that the Court may send a *certiorari* as well to reverse as to affirm, after *in nullo est erratum.*

POWELL, *Justice*, *accord.* The release being as none, because not well pleaded, does not tie our hands, but we may award a *certiorari* to know whether this be error or not: and the Court may do it to be informed of any error in law, where they are not foreclosed by the act of the party; and this is such. And wherever the Court are not barred from examining the errors on the record, they may inform themselves thus of the true state thereof, though the parties have foreclosed themselves of that advantage by pleading or confession; for they must affirm or disaffirm the judgment, upon view of the whole record, according to their knowledge and conscience, without regard to the party's admission; and therefore they ought to know of their own knowledge whether there be error in law, and not to rely upon the party's admission. The case in the time of *Edward the Fourth* (*d*) is the first that I find in the Books of *certiorari's ex officio Cur.* and there the parties

(*a*) See Year-Book 7. *Edw.* 4. pl. 25. 1. Roll. Abr. 764, 765.
(*b*) Cro. Jac. 60. Latch, 152. 1. Jones, 139.
(*c*) 5. Co. 36.
(*d*) Year-Book 2. *Edw.* 4. pl. 32.

agreed

agreed the record, as removed, to be perfect, and yet the Court awarded a *certiorari*. And I cannot tell but in many cases the Court are bound to do it, especially to affirm a judgment. It cannot be at the prayer of the parties, because they have estopped themselves by their plea, and in some cases the Court have denied it to reverse a judgment. In the case of *Young v. Young* (*a*), an infant brought an original; in which case he need not find pledges; but if he come of age before judgment, he ought to add them; [illegible] that being the case, "want of pledges" was assigned for error; [illegible] the Court would not grant a *certiorari* to make error; and with this agrees the case of *Felton v. Weaver* (*b*). The difference is between the case of the plaintiff in error and of the defendant. If the plaintiff assign error, and take a *scire facias ad audiendum errores*, and that it is returned "*served*," and then the plaintiff is nonsuited, or enters a *retraxit*, the Court without more will affirm the judgment (*c*). Another difference is between errors in law and errors in fact: If error in fact be alledged, and "*in nullo est erratum*" pleaded to it, or a release, and that is found against the pleader, it is a confession of the error, and the Court thereupon shall, without more, reverse the judgment; but pleading a release of an error in law is not so, for a release will not make that error that is not so, as appears to the Court on record; but the release there is only a bar of the vexation of the suit of the writ of error, for the Court cannot proceed but upon a writ of error, and the release may bar that; but if a release be pleaded which does not bar the writ, the Court may proceed to examine the record: and so is the case in the time of *Edward the Third* (*d*). * And where-ever they can go to examine errors, there they must take all legal ways to be informed of the whole record. And he quoted the case of *Dove v. Smithers* (*e*). And as to *Bishop's Case* (*f*), as reported by *Coke*, it was after "*in nullo est erratum*" pleaded, but there the party took out a *certiorari* without leave of Court and they held, that he could not have that writ after that plea, whereby he had concluded himself, but that the Court might *ex officio* award it; and though it was annexed to the record by the act of the party, yet the Court took it off, and awarded one themselves. As to the difference between error in fact and in law, it appears (*g*), that error in fact may be confessed, but that error in law cannot, so as to tie up the hands of the Court; for though the party do confess the want of a writ original, *capias*, &c. the Court cannot take his word, and reverse the judgment, but they must inspect the record, and be informed (*h*). And the form of entries in case of awarding *certiorari ex officio* is *quia expediens Cur. videtur*, to know whether there be such a writ or not (*i*). It is objected, that the nature of this error is such as may be confessed, for it is

CARLETON *against* MORTAGE.

12. Mod. 560.

* [208]

1. Cro. 84. Mo. 700. 1 Leon. 22. Yel. 117, 118. 1. Roll. 754, 755. 1. Keb. 225.

Ante, 194.

(*a*) Palm. 520.
(*b*) Latch, 152. S. C. Jones, 139. S. C. Noy, 83.
(*c*) Year-Book 21. *Edw.* 4. pl. 38, pl. 39. pl. 44.
(*d*) Year-Book 21. *Edw.* 3. pl. 54.
(*e*) 1. Jones, 352. 373. Cro. Car. 415.
(*f*) Cro. Eliz. 497. S. C. Gouldsb. 151.
(*g*) Year-Books 7. *Edw.* 4. pl. 16. Bro. Abr "Error," 105. Fitz. Abr. "Error," 4.
(*h*) See 4. Burr. 2551.
(*i*) Skinner, 419. to 422.

 only

CARLETON *against* MORTAGH.

only whether there may be such a writ or no. But I answer, it is matter of law, whether there be *an original* in the cause or no. And he concluded to award the writ.

HOLT, *Chief Justice, contra.* I am glad my BROTHERS can be against me in this case for supporting a judgment, but I am sorry that I cannot agree with their reasons.

FIRST, Because the question now before us is not whether there be error or no, but whether the plea in bar be good as pleaded. When error is assigned, and "*in nullo est erratum*" pleaded, or default is made, there the matter of error is the question in case Court; but now the matter put in our judgment is, whether the plea be good or not; so that now we are determining another question than is in judgment before us. If "*in nullo est erratum*" be pleaded, or a default made, no doubt the Court may award a *certiorari*. In the case of *Done v. Smithers (a)*, that which was assigned for error appeared to the Court to be no error; then the matter pleaded in bar of that error, though against the defendant, was impertinent, because it appeared to the Court to be no error. If in debt upon a bond the declaration be bad, and the plea in bar be so too, yet judgment shall not be for the plaintiff upon the bad bar, but against him, because the declaration appearing to be bad, the bar is insignificant (*b*). So in a writ of error, if a release be pleaded, and issue thereupon found for the plaintiff, and there appear no error on the record, the judgment shall be affirmed (*c*), because the Court are to judge of the whole record before them. If a bad plea in bar be pleaded to a bad declaration, or to a bad assignment of error, it is idle, and the Court shall take no notice of the insufficiency of it, but shall judge on the record. And so agrees

* [209] the case in the *Year-Book* (*d*); for notwithstanding a * release found for the plaintiff in error, yet, if there be no error, the judgment shall be affirmed: but here is apparent error, *viz.* the want of an *original* in an action in the common pleas. Suppose then the defendant had not come in *gratis*, and pleaded a release, but the plaintiff had assigned errors, and taken out a *certiorari*, and it were certified that there was no *original*, and then the defendant had come and pleaded the release, as here, you would not, in that case, have granted a *certiorari*, and yet you might as well do it then as now; for now the defendant by coming in *gratis* saves the plaintiff the trouble of a *certiorari*, and admits error, but pleads a release: So it appears to the Court, that there is a good and substantial error, and that the defendant has not barred it by his plea, therefore it is not in judgment before the Court whether there be error or not, there being apparent error on the record before them.

Vide Keb. 225. 2. Cro. 443. Godb. 407.

SECONDLY, This is a demurrer to the plea in bar, and the whole event of the cause is put in judgment upon the demurrer. When there is a demurrer and joinder in it, the Court is bound to

(*a*) 1. Jones, 352. 373. Cro. Car. 415.
(*b*)
(*c*)
(*d*) 21. *Edw.* 3. pl. 54.

give

give judgment upon that; now if you award a *certiorari* here, you strike the plea, the demurrer and the joinder in it out of the case, and was such a thing ever done? If it be certified that there is *an original*, what will become of the demurrer? For if you give judgment upon *certiorari* you must set aside the demurrer, for you cannot give judgment upon both; for if you do, you must give it for the defendant upon the *certiorari*, and for the plaintiff on the demurrer; a manifest contradiction. If an original be certified, and you give judgment for the defendant, you must waive the demurrer put to your judgment by the consent of the parties: and no case is parallel to this; for consider, you are not upon the issue of error or no error, but upon the point of bar or not, for that is what the parties demand your judgment in.

CARLETON against MONTAGUE. 2. Keb. 27. pl. 21.

THIRDLY. The want of *an original* is confessed here as flatly as can be. Indeed the assignment of error is not complete until a *certiorari* is returned for the plaintiff; and here you for the defendant have prevented him of that by coming in *gratis*, and admitting the want of an original; but depend upon it he ought not to assign error, because of his release. So he having admitted it in this manner, both parties demand judgment upon the release; and for the Court to go upon another point than what is put in their judgment by both parties, is a kind of a departure from the point in issue. In the *Year-Book* (a), it is said *arguendo*, that if error be assigned out of the record, as the want of an original, or the like, though the defendant confesses this error, the Court are not bound by such confession; and that I agree, if the question be, whether error or not, as in an *in nullo est erratum* pleaded, or in default to the *scire facias*, which are not full admissions, but *quasi* admissions, and not near so full as pleas in bar; but where the defendant agrees that there is error, but insists upon it that the plaintiff released it, the Court does not go so far as to say, that they may scruple, and send a *certiorari* there too. If the defendant in error come in before any *certiorari*, and plead a bar, and a demurrer is thereunto, and it never was questioned but he *might well do so, it would then be the same thing as if it had been certified "*no original*." If so, suppose, instead of a demurrer, issue had been upon this plea, and found for the plaintiff, would you in that case award a *certiorari*? Yes; you must maintain it, that you are at liberty, even after a verdict, to try whether the trial was to any manner of purpose: And what will the consequence of these things be? No doubt, after "*in nullo est erratum*" pleaded, the Court may grant it, though the party has foreclosed himself from praying it; but if the Court be informed matters are right below, I think, *ex debito justitiæ* in that case, they are bound to send for it; and where they can do, I say, I think, *ex debito justitiæ*, they ought to do it. It has been said (b), they could not do it to reverse a judgment; though there are other opinions to the

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1. Keb. 91. 211. 225.

(a) 7. Edw. 4. pl. 16. (b) Cro. Jac. 6. 141. 1. Jones, 141.

CARLETON *against* MORTAGE.

Cro. Jac. 6. 141. 2 Jo. 141. that it be in both cases.

the contrary (*a*), it was granted: so is *Croke* (*b*), that if THE PLEA-ROLL be certified, and it appears to be erroneous, the defendant, before *in nullo est erratum* pleaded, may alledge *diminution*, and get THE ROLL amended below, and certified up right; and an amendment may be below in the body of the record, even after *in nullo est erratum* pleaded; and that is the reason that, upon *diminution* alledged, we order the clerk of the treasury to attend, where there is an erroneous judgment through the fault of the clerk, as in the late case of *Morrison v. Fanshaw* (*c*), where the judgment was in a *scire facias* upon a recognizance upon a writ of error for costs for delay of execution, the right formal way had been to have it amended below, and to send a *certiorari* to have it sent up as amended; but we take a summary way, desiring them to get it amended below, if it may be; and, upon the clerk's coming up, it is set right here And he quoted the case of *Gwyn v. Gwyn* (*d*) thirty years ago: judgment was in *Wales*, "therefore "it is considered, &c. *quod querens teneat*," instead of *recuperet*; and this was held to be error, and great endeavours made to have it amended; the docket book was right, and the Court said, if the docket had been made they would amend by it; and he put the case of *Done v. Smithers*.

(*a*) Cro. Eliz. 836, 837.
(*b*) Cro. Jac. 445.
(*c*)
(*d*) Cro Car. 301. S. C. Godb. 448. S. C. 1. Keb. 495. 543 537. 626. S. C. 1. Sid. 138. S. C. 1. Lev. 99.

Case 297. Anonymous.

Keeping open shop on a fast-day is an indictable offence; but each offender must be separately indicted. Hob. 251.

SEVERAL house-keepers, being *Quakers*, were indicted for keeping their shops open on a day ordained by proclamation for a public humiliation and prayer.

And because they were several distinct crimes in every distinct offender, and therefore not to be joined in one indictment, it was quashed.

Case 298. Powell *against* Ball.

To hinder a bailiff from arresting a man is a contempt of the Court.

IF A BAILIFF has a warrant to arrest a man, and another hinder him from doing it, there being no actual arrest, it is not a *rescous*, yet it is a *contempt of the Court* (*a*).

Ante, 105. 173. Post. 211. 1. Cro. Eliz. 909, 910. 753. Yelv. 28. 2. Roll. 294. Hob. 62, 263. Owen, 63. 11. Co. 82. 12. Co. 131. Cro. Car. 537, 538. Cro. Jac. 280. 556. 486, 12. Mod. 247.

(*a*) See Wilson v. Gray, Post. 211.

Anonymous.

* Anonymous. Case 299.

PER CURIAM. Where *a view* is proper, there, upon motion before trial, we will grant it, in like manner as we used at THE ASSIZES, and that is after the jury is sworn, and then it must be by consent, and a juror withdrawn. Rule, upon granting *a view*. 2. Salk. 665. 1. Show. 3. 2. Lev. 117. 1. Burr. 252.

HOLT, *Chief Justice*. I think we may award *a view* without consent. And notwithstanding this view, a juror may be challenged when he comes to be sworn (*a*).

(*a*) See the statute 4. *Anne*, c. 16. and 3. *Geo.* 2. c. 25. s. 14. and the regulations made by the Court upon these statutes concerning *views* in civil actions, 1. Burr. Rep. 252. to 259.

TRINITY TERM,

The Third Year of Queen Anne,

AT

The Sittings in Middlesex,

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

THE COURT OF QUEEN's BENCH.

Wilson *against* Gary. Case 300.

AN ACTION ON THE CASE for rescuing a person arrested on *mesne process* at the plaintiff's suit.

In case for *rescue* upon *mesne process*, the plaintiff must prove the original cause of action, the writ and warrant, and a legal arrest.

THE FIRST POINT of evidence was the original cause of action.

THE SECOND POINT of evidence was, the writ (*a*) and warrant, by producing copies of them sworn to be examined and true (*b*).

S. C. Holt, 628. 1. Salk. 79. 2. Salk. 586. Ante, 173.

THE THIRD POINT of evidence was, the arrest, shewing the manner of it, that it might appear to the Court to have been legal, for otherwise there could be no *rescous*.

And, FOURTHLY, in point of damage, they proved the loss of their debt, for that the prisoner became insolvent, or could not be had.

But though *expedient*, it is not *necessary* to prove the *loss of the debt*. Ante, 141. 210. Espinass. 657.

But as to that, HOLT, *Chief Justice*, said, in case of *rescous* you shall have no favour, because guilty of a violence against the

(*a*) See Blatch *v.* Archer, that in an action of debt for an escape against the sheriff, the indorsement of *non est inventus* upon the *capias ad satisfaciendum* is sufficient evidence of its being delivered to the sheriff. Cowp. 63.

(*b*) See Blatch *v.* Archer, Cowper, 63.

process

WILSON *against* GARY.

process of the law, and therefore not like the case of a negligent escape.

Quære, Whether an arrest by the *bailiff's servant* be good.

Vide Pa. 210. Bull. N. P. 63. 4. Com. Dig. "Execution" (C. 12.). 1. Bac. Abr. 332.

NOTE, The case upon evidence appeared thus: The bailiff stayed below at the street-door, and sent his follower with the warrant up three pair of stairs in disguise, who there laid hands on the prisoner, and told him, he arrested him: the prisoner, with the assistance of some women, got from him, and run down to the first floor; and the defendant being below in his shop, and hearing the noise, ran up before the bailiff, opened the door, and put the prisoner in, and would not suffer the bailiff to go and take him (*a*).

And HOLT, *Chief Justice*, seemed to doubt whether this were a good arrest, being only by the plaintiff's servant, or if it had been done by the servant even in the bailiff's presence (*b*), but yet charged the jury generally, who found for the plaintiff.

But he ordered THE POSTEA to be stayed till he had marked it.

In an action for a rescue the party rescued is a competent witness.

3. Mod 114, 115. 1. Stra. 649. 12. Mod. 338. Ld. Ray. 369. 730, 2. Stra. 828. 1229. 1043. 1104.

HERE the party rescued appeared, and was sworn as a witness for the defendant, not being made party to the action:—which HOLT, *Chief Justice*, *hæsitanter*, allowed, upon the reason that he swore to charge himself, if by his evidence he discharged the defendant; but he said, it was what he never had seen before, and that if the defendant was guilty of the *rescous*, he could not but be *particeps criminis*: however, he was sworn, and his credit left with the jury.

(*a*) A bailiff, in execution of *mesne process*, may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house, Lee *v.* Gansel, Cowp. 1.

(*b*) The arrest must be made by the *authority* of THE BAILIFF, but he need not be the hand that arrests, nor in the *presence*, nor actually in sight, nor within any precise distance, of the person arrested, Blatch *v.* Archer, Cowp. 65.

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Case 301.

* The Queen *against* Middlemore.

An indictment against several for a *misdemeanor* may be tried against *some* only, on the others entering into a rule to plead *guilty* if their co-defendants are convicted.

A GREAT NUMBER OF PEOPLE were indicted for a riot.

It was moved, that the prosecutor should pitch upon three or four of them, and try it only against them, the rest entering into a rule, that if they were found guilty to plead guilty too.

And this was said to be done frequently, to prevent the charges of putting them all to plead.

And the rule was so.

1. Hawk. cap. 65. Blackerby's Cases, 211, 212, &c. 4. Com. Dig. 406.

Anonymous.

Anonymous. Case 302.

IF JUDGMENT upon a warrant of attorney be not entered within the year, it cannot be without leave of Court on motion.

Judgment upon a warrant of attorney, when to be entered. Ante, 14. 191. Post. 288. Ld. Ray. 850. Stra. 639. 718. 882.—See Lushington v. Walter, 1. H. Bl. Rep. 94.

Baldwin *against* Cole. Case 303.

TROVER. The case, upon evidence, was this;

A *demand* of goods by, and a *refusal* to restore them to, the right owner, is not merely an *evidence*, but an *actual conversion* of them.

A carpenter sent his servant to work for hire to the queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

S. C. Holt, 707. 1. Lev. 173. 10. Co. 56. 1. Cro. 262. 2. Salk. 655. 1. Danv. 21. L 2. 2. Mod. 245. 3. Mod. 2. 5. Mod. 426. 2. Show. 148. 175. b. 213. 5. Bac. Abr. 259. Comy. Rep. 157. 8. Mod. 177. 322. 12. Mod. 344. Stra. 60 128. 142. 505. 576. 651. 1078.

HOLT, *Chief Justice*. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion, but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them: so the taking and carrying away another man's goods is a conversion: so if one come into my close, and take my horse and ride him, there it is conversion: and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages: and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service, and brought his own horse, that the property thereof was immediately altered, and vested in the queen; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found *not guilty* as to that, and *guilty* as to the rest.

TRINITY TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Esq. Attorney General.*
Simon Harcourt, *Esq. Solicitor General.*

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* The Queen *against* Foxby. Case 304.

On a writ of error on an indictment for being a *common scold*, if the defendant be so ill that she cannot assign error in person, the Court, on affidavit, will enlarge the time.

SHE brought a writ of error of a judgment against her upon an indictment for being *a common scold*; and upon affidavits, that she was so ill, that without danger of her life she could not come up out of *Kent*, where she lived, to assign error in person, according to the course of the Court,

BROTHERICK and WELLS moved, that she might have leave to assign error by her clerk in court.

And WELLS said, he knew no law for ducking of scolds (*a*).

S. C. ante, 18. 178. S. C. post. 239. S. C. 1. Salk. 266. S. C. Holt, 274. 4. Com. Dig. "Leet" (L. 3.)

PER CURIAM. Scolding once or twice is no great matter; for scolding alone is not the offence, but it is the frequent repetition of it to the disturbance of the neighbourhood which makes it *a nusance*, and as such it always has been punishable in the leet, and therefore indictable (*b*). And we have of late indulged people upon writ of error of judgments on indictments to appear by attorney.

And here they enlarged the time until the next Term, to see how she would behave herself in the mean time: for HOLT, *Chief*

(*a*) Ante, 11. 178. 1. Hawk. P. C. ch. 75. f. 14.

(*b*) See 2. Roll. Abr. 79. 1. Mod. 71. 288. 1. Hawk. P. C. c. 75. f. 5.

Justice,

THE QUEEN *against* FOXBY.

Justice, said, that *ducking* would rather harden than cure her; and if she were once ducked, she would scold on all the days of her life.

Vide post. 239.

And in *Michaelmas Term* her husband and she came into court, and BROTHERICK moved, that they might assign error, which they did.

Case 305. The Inhabitants of the Parish of Westbury in Wilts *against* The Inhabitants of Costham.

If a woman with child be fraudulently removed from *A.* to *B.* and be delivered at *B.* and the order is afterwards quashed, the child is not settled at *B.*

S. C. 1. Salk. 121, S. C. 2. Salk. 532. S. C. Sett. & Rem. 146. S. C. Holt, 580.

A POOR WOMAN with child was removed by order of two justices from *Westbury* to *Costham*, and before the sessions brought-to-bed there, and then the order was quashed upon appeal.

PER CURIAM. The child is legally settled in the parish of *Westbury*, from whence the mother was illegally removed, for they shall not take advantage of their own wrong; and so it would have been if they had not known of the woman's being with child at the time of the wrongful removal. If a woman with child be travelling without fraud of the parish in which she is settled, and in such travel is delivered of her bastard, it shall in that case be settled where it was born, *secus* if there be fraud; and according to this was quoted the case of the *Parish of Bowham* in *Essex* some years ago.

Salk. 474. 2. Bulst. 349. Stra. 51. 438. 580. 831. Ld. Ray. 395. 471. 1332. 1473.

An order of bastardy on a *married woman* must shew that her husband is *dead.*

NOTE, Also it appeared upon the order of removal, that the woman had a husband who had left her seven years before, but it was not said that he was dead, so that it could not be *a bastard* clearly (*a*).

So, PER CURIAM, both points were clearly against the parish of *Westbury*.

(*a*) See Rex *v.* Albert Alverstone, Carth. 469. S. C Ld. Ray. 395. S. C. 5. Mod. 419.; Rex *v.* Murray, 1. Salk. 122.; Rex *v.* St. Bride's, 1. Stra. 51.; Rex *v.* Reading, Cases T. H. 79.; Rex *v.* Bedall, 2. Stra. 1076.; Rex *v.* Rooke, 2. Wils. 340. and Mr. Const's edit. Bott's P. L. vol. i. page 394. to 402.—But see the case of Rex *v.* The Inhabitants of Lubbenham, 4. Term Rep. 251. and Goodright *v.* Saul, 4. Term Rep. 356.

TRINITY TERM,

The Third Year of Queen Anne,

AT

Sittings

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

THE COURT OF QUEEN's BENCH.

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*[214]

Case 306.

* Tracy *against* Talbot.

If a house originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other, the several apartments shall be rated as distinct mansion-houses; but if the owner live therein, all the un-tenanted apartments shall be considered as parts of his house.

S. C. 2. Salk. 532.

REPLEVIN. The case upon evidence before HOLT, *Chief Justice*, at *nisi prius*, was this:

The plaintiff having been *a lodger* in the parish for some time before, took part of a house there on the *third of December*, and was rated to the parish as an inhabitant for the quarter expiring at *Christmas*. Before *Christmas*, the distress was taken for the rate, by virtue of a *general warrant* made long before for *the whole year*,

FIRST in respect of separate tenements chargeable to the parish.

HOLT, *Chief Justice*, said, One house originally entire and undistinct, may become several and distinct, by dividing it into distinct partitions, and allotting them distinct avenues, so as the several inhabitants have no communication one with another (a); and in that case, if the owner of the house live in one of the separate apartments himself, and an inhabitant of another separate apartment go away, that tenement which he occupied is not now an empty tenement, but the possession of it devolves upon the owner, and that, with the tenement in his possession before, make

S. C. 3. Salk. 260. S. C. Sett. & Rem. 235. S. C. Holt, 581. S. C. Foley, 15.

(a) See Lee v. Gansel, Cowp. 1.

now

TRACY *against* TALBOT.

now but one entire tenement, for which he is rateable to the parish (*a*). But if there be two several tenements originally, and they become inhabited by several families, who make but one avenue for both, and use it promiscuously; yet, in respect of the original severally, they continue severally rateable.

An inhabitant who comes into a parish in the middle of a quarter, cannot be rated for the whole quarter.

But two points were allowed by HOLT, *Chief Justice*, to be found specially.

FIRST, Whether if an inhabitant come into a parish three weeks before quarter-day, he can be rated to the parish for the whole quarter?

Ld. Ray. 798. 1009. 1013. 1280. Stra. 77. 56. 100. 393. 526. 630. 1071. 1114.

SECONDLY, Whether the distress could be taken by virtue of a *general warrant* made before the rate?

And yet he was very clear in the negative in both points.

FOR, FIRST, By the statute 43. *Eliz.* c. 2. poors rates are to be made *monthly* (*b*), and the reason is, because of frequent changes of possession, in respect whereof only one is rateable; whereas at this rate, none could remove in the midst of a quarter without being doubly chargeable (*c*).

A distress cannot be made for a rate by a warrant issued before it is due.

SECONDLY, He held, in no case one could be taken up by virtue of a warrant made before the offence committed, or by virtue of a *general warrant*, but where the taking would be justifiable without any warrant at all, other than a warrant in law.

Distress may be for a quarter's rate before end of the quarter.

A THIRD POINT which HOLT, *Chief Justice*, seemed not satisfied in, was, Whether when a rate is made for a quarter, they may distrain for it before the end of the quarter?

But ALL THE JURY said, that the constant usage was to do it, and that to avoid the mischief that would ensue if the party should remove out of the parish before the quarter.

(*a*) See the case of Rex *v.* St. Mary the Less, in Durham, 4. Term Rep. 477.

(*b*) The words of the 43. *Eliz.* c. 2. s. 1. are, that the overseers, &c. shall "raise *weekly*, or otherwise, by taxation "of every inhabitant, &c. in the parish, "in such competent sum and sums of "money as they shall think fit, a convenient stock of flax, &c. to set the poor "on work, and also competent sums of "money for and towards the necessary "relief of the poor, &c." But it seems that no precise period of time is fixed for which a poor-rate ought to be made. See Rex *v.* Littleport, ante 97. Rex *v.* Bishopsgate, 8. Mod. 10. Stevens *v.* Evans, 2. Burr. Rep. 1152. 2. Black. Rep. 694. 1. Bott's P. L. 63, 64.

(*c*) But now by 17. *Geo.* 2. c. 38. s. 12. "Where any person or persons shall come "into, or occupy any house, land, tenement, or hereditament, or other premises, out of, or from which any "other person assessed shall be removed, "or which at the time of making such "rate was empty or unoccupied, that "then every person so removing from, "and every person so coming into, or "occupying the same, shall be liable to "pay such rate in proportion to the time "that such person occupied the same, "respectively in the same manner, and "under the like penalty of distress as if "such person so removing had not removed, or such person so coming in or "occupying had been originally rated and "assessed in such rate; which said proportions, in case of dispute, shall be "ascertained by two justices of the "peace."

To

* To which HOLT, *Chief Justice*, answered, That if he removed into another parish in the same county, they might distrain by a warrant from the justices, as well as in the same parish; but if he removed out of the county, he agreed that the remedy failed.

A *parish-rate* may be distrained for in a *different parish* in the *same county*.

So he gave way to the usage in that point.

Dod *against* Monger. Case 307.

AN action on the case for rescuing goods which the plaintiff had distrained for rent.

The plaintiff declared, that he was seised in fee of a certain messuage, &c. that being so seised, he demised it to *J. S.* for a year, and so from year to year as long as both parties should please, by a *parol-demise*, reserving rent; that for rent-arrear he distrained; and that the distress was rescued from him by the defendant; for which the action was brought.

The plaintiff having laid a *seisin in fee* in himself, was fain to prove it.

And in proving the lease, it appeared to be for a year, and so from year to year as long as both parties pleased; and that the lessee should not go away without giving a quarter's warning.

EYRE and PARKER insisted, that the lease given in evidence varied from the lease declared on (*a*), so they failed in proving their declaration.

HOLT, *Chief Justice*. It is well enough; for the agreement concerning the quarter's warning is only a collateral agreement, not at all affecting the land in point of interest, but collaterally binding the person of the lessee, and therefore it need not be mentioned in the declaration. In this case, if at the year's end the lessee had given up the possession without any warning, he would be liable to pay a quarter's rent by virtue of this agreement; but if he had given a quarter's warning, he might quit without more ado; but if he once entered upon the second year, he would be bound for all that year, and to a quarter's warning, and so on. So it would be if such a lease had been by deed: if a lease be for a year, and so from year to year, as long as both parties shall please, that is a lease binding but for one year; but if a lessee, without countermand of the lessor, enter upon the second year, he is bound for that year, and so on; but if a lease be for a year, and so from year to year, until six years expire, that is a certain lease for six years: if it be for a year, and so from year to year, as long as both parties shall agree, until six years shall expire, that is a lease for six years, determinable at every year's end at the will of either party (*b*).

In an action on 2. *Will. & Mary*, c. 5. for rescuing a distress, if the plaintiff state that he was *seised in fee* of the premises, and demised them by parol "for *a year, and* "*so from year to* "*year*," he must prove the *seisin in fee*; but he need not either state or prove that he *gave warning*: if however it appear that the letting was "for a "year, and so "from year to "year *as long as* "*both parties* "*pleased*," this will not maintain *the demise* stated in the declaration.

S. C. Holt, 416. Co. Lit 47. 1. Roll Abr. 673. Cro Eliz. 720. 1. And. 71. 1 Salk 247. Lut. 213. Dougl. 279. 1. H. Bl. Rep. 311.

(*a*) See Hare *v.* Cator, Cowp. 766. (*b*) See 4. Term Rep. 680.

Distress when to be removed. 3o. Mod. 265. 1. Ld. Ray. 54. 2. Ld. Ray. 1424. Stra. 717. 851. 1040. 1272. 3. Com. Dig. "Distress," (D. 1.)

AND HE LIKEWISE HELD, that if a landlord come into a house, and seize upon some goods as a distress, in the name of all the goods in the house, that will be a good seizure of all.

But he must remove them in convenient time at common law; and now since the late statute of 2. *Will. & Mary*, *sess.* 1. *c.* 5. immediately, except it be *hay* or *corn* (*a*); especially here, for that the seizure was on *Monday*, though of *barrels of beer*, not easily removeable, if at all, without damage, and no removal until *Wednesday*, when the defendant took them by virtue of a *replevin*, in which the *lessee, not the distrainant, was made defendant.

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If a *distrainor* quit possession, a re-taking of the goods is not a rescous.

And besides, the plaintiff quitted possession of them the two intervening nights, and had not the possession at the time of the taking by virtue of the *replevin*, without which there could be no *rescous*.

The plaintiff was nonsuited.

How far a distrainor may be a trespasser. 1. Roll. Abr.

In this case it appeared also, that the distrainant drew beer out of one of the barrels; which, PER HOLT, *Chief Justice*, made him a trespasser *ab initio* (*b*) as to that barrel only.

673. 8. Co, 146. 1. Leon. 220. Cro. Eliz. 783. Cro. Jac. 148. 1. Vent. 77. Owen, 46.

(*a*) See 11. *Geo.* 2. c. 19.

(*b*) But by 11. *Geo.* 2. c. 19. s. 20. Distresses for rent shall not be deemed unlawful for any irregularity or unlawful act afterwards done by the party distraining, nor the party deemed a trespasser *ab initio*; but the parties grieved thereby may recover satisfaction for the special damage, and no more, on an action of *trespass* or *on the case*, &c.

Case 308.

Rich *against* Aldred.

If *A.* bail the goods of *C.* to *B.* and *C.* brings *detinue* against *B.* he may plead *the bailment*, and pray *garnishment*. 1. Salk. 223. 2. Roll. Abr. 714.

DETINUE for *Oliver Cromwell* the Protector's picture.—PER HOLT, *Chief Justice*, at the trial. If *A.* bail the goods of *C.* to *B.* and *C.* bring *detinue* against *B.* for them, *B.* may plead *the bailment* to him by *A.* to be re-delivered to *A.* and so bring in *A.* as *garnishee*, to interplead with *C.* And if *A.* bail goods to *C.* and after give his whole right in them to *B.* *B.* cannot maintain *detinue* for them against *C.* because the *special property* that *C.* acquires by *the bailment*, is not thereby transferred to *B.* (*a*).

(*a*) See Year-Book 6. *Hen.* 7. pl. 9. a. Brook Abr. "Detinue," pl. 19.

Case 309.

Johnson and his Wife *against* Browning.

In an action for malicious indictment, if the

ACTION on the case for maliciously indicting and prosecuting the wife for felony, whereof she was acquitted.

indictment be recited "*according to the substance following*," a variance of "*valoris*" instead of "*valentiae*" is immaterial; but if the recital had been "*in haec verba*," the variance would be fatal. S. C. Holt, 3. Ante, 25. Post. 261. 1. Salk. 14; 15. 5. Mod. 349. 405. 8. Mod. 227. 307. 10. Mod. 145. 148. 209. 214. 11. Mod. 180. 12. Mod. 208. 273. 555. Fitzg. 43. 98. 173. 1. Ld. Ray. 81. 378. 503. Stra. 114. 691. Cowper, 229. See Espinass. Dig. 532. 4. Term Rep. 590.

The

The declaration recited the indictment, *continent' materiam sequentem*; and in the recital of the goods supposed to be stole, it was *valoris* of so much; whereas the indictment was *valentiæ* of so much.

JOHNSON AND HIS WIFE *against* BROWNING.

It was objected, that this was *a variance* from the indictment.

But it was over-ruled; for that was the same in substance, and so *materiam sequentem*; but if they had undertaken to set forth the indictment *in hæc verba*, it would have been a fatal exception (*a*).

NOTA, by HOLT, *Chief Justice*. To do the business fully, the plaintiff ought to have proved a copy of the bill exhibited (*b*), and that it was found upon the oath or procurement of the defendant; but their names upon the back of the bill is sufficient evidence of their being sworn to the bill (*c*), though the writing upon the back be no part of the record: but it may be proved, that the defendant was a witness without having the bill; but it were, I say, more clear to have the bill.

In what manner a malicious prosecution may be proved.

And the first part of the defendant's defence in this case must be to prove a *felony committed*; for without that it is impossible he could have a *probable cause* of prosecution (*d*).

An action for a malicious prosecution will not lie, if there were *probable cause* for it.—10. Mod. 217. Bull. N. P. 14. Ld. Ray. 190. 729. 738. 752. 1. Stra. 79.

And here, because nobody was by at the time of the supposed felony committed, but the defendant's wife, who could not in this case be a witness to prove the felony committed,

HOLT, *Chief Justice*, allowed her oath, which she made at the trial of the indictment, to be given in evidence to prove a felony committed; for otherwise one that should * be robbed, &c. would be under an intolerable mischief; for if he prosecuted for such robbery, &c. and the party should at any rate be acquitted, the prosecutor would be liable to an action for a malicious prosecution without a possibility of making a good defence, though the cause of prosecution were ever so pregnant.

In an action for a malicious prosecution for felony, the oath of the defendant, made at the trial of the indictment, admitted to prove the felony committed. Bull. N. P. 15.

* [217]

(*a*) Rex *v*. Beach, Cowp. 229. Dougl. 194. notis. Dougl. 97. Rex *v*. May, Dougl. 193.

(*b*) See Morrison *v*. Kelley, 1. Black. Rep. 383.; that a copy of the indictment must be produced when the indictment was for *felony*, but when it was for a *misdemeanor* only, a copy is not necessary. See Jordan *v*. Lewis, 1. Stra. 1122. and 3. Black. Com. 126.

(*c*) See Gillington *v*. Pitfield, 1. Vent. 47.

(*d*) To support this species of action, it must appear that there was *malice* in the defendant, and a want of *probable cause* for the prosecution, Bull. N. P. 14. but the absence of *probable cause* shall be taken as strong evidence of malice, Reynolds *v* Kennedy. 1. Wils. 232. Johnston *v*. Sutton, 1 Term Rep. 493. 544.; and what shall be deemed *probable cause* is matter of fact for the opinion of the jury, Bull. N. P. 14. But although *express malice* be proved, yet unless there also appear want of *probable cause*, the defendant cannot be convicted, Bull. N. 14. and therefore it is a good defence to shew fair and reasonable grounds for *suspecting the guilt* of the plaintiff, Knight *v*. Germain, Cro. Eliz. 134.; Pain *v*. Rochester, Cro. Eliz. 871. although, in point of fact, no *felony* was actually committed, Samuel *v*. Payne, Dougl. 359.; Ledwick *v*. Catchpole, Cald. Cases, 291.

Johnson and his Wife against Browning.

DARNELL, *for the plaintiff*, said, that if oath had been made freshly after the fact committed, that oath might be admitted as evidence of it; otherwise not; but that here it appeared a warrant was taken out immediately, but nothing done thereupon until the defendant had a subsequent falling out with the plaintiff.

HOLT, *Chief Justice*, said, that the fact of *Pigot's Case* (a) was this: A *son-in-law* indicted his *step-mother* for poisoning her husband, his father; that she, being acquitted, brought an action for malicious prosecution against him, and recovered damages against him; that he, to requite her kindness, brought an appeal of murder; and that she was thereupon tried, and convicted at the king's bench bar, and carried down, and burnt in *Berkshire*, where the fact was committed. And he remembered another very lately, where a fellow brought an action for saying of him, "*he is a highway-* "*man*;" and it appearing upon evidence that he was so, he was taken in court; committed to NEWGATE; convicted at the next sessions; and hanged. So that people ought to advise well before they bring such actions.

And DARNELL remembered the like fate which befel a client of his.

(a) Cro. Car. 383.

Case 310. Bushell *against* Pasmore.

In debt on bond, if the defendant plead that it was delivered as an *escrow* upon a condition not performed, and so *not his deed*, a conclusion *to the country*, is cured by replying a different *condition*, and traversing the condition stated in the plea.

S. C. Holt, 213. Plowd. 66. Hob. 246. Cro. Eliz. 800. 3. Keb. 142. Savil, 71. 1. Salk. 274. 7. Mod. 53. Ld. Ray. 254. 2. Wils. 341. 347.

DEBT upon a bond: the defendant pleads, that the bond was delivered as *an escrow* to a third person, to be his deed to the plaintiff upon his vacating a certain judgment, which was not done, and so "*non est factum*;" *et de hoc ponit se super patriam* (a), without adding, *et prad'* the plaintiff *similiter*.

The plaintiff replies, that it was delivered as *an escrow*, to be delivered to him upon his payment of twenty shillings towards vacating the judgment.

And issue was taken thereupon; that is, upon A TRAVERSE of its being delivered as *an escrow*, to become his deed upon vacating the judgment.

On evidence, it was sworn to have been delivered as *an escrow* to become the defendant's deed upon the plaintiff's vacating the judgment.

In what cases a written obligation delivered as an *escrow*, shall become *a deed*.—2. Roll. Abr. 683. Ray. 197.

HOLT, *Chief Justice*, held, that there is no difference between delivering a deed as *an escrow*, to become the party's deed upon

(a) See the case of Watts *v.* Rosewell, *v.* Blantern, 2. Wils. 341. 347. 1. Salk. 274. 7. Mod. 53. 105. Collins

his

his doing such a thing, and to be delivered to the party as his deed upon his doing such a thing; for in neither case it is his deed until the second delivery: and he said, if a man deliver a writing as his deed to a stranger, to be delivered by him to a third person upon his doing such a thing, that is a deed *ab initio* in trust for * the third person upon a contingency: but upon the saying in *Periman's Case* (a), he was content to have the matter found specially. **Bushell against Pasmore.** *[218]

But the plaintiff was nonsuited upon another point.

And Holt, *Chief Justice*, said, that in all his time he never knew such A PLEA as this; for all these special *non est factums*, in case of *escrow* and *rasure*, &c. are impertinent, for thereby the defendant brings all the proof upon himself; whereas if he had pleaded "*non est factum*" generally, he would have turned the proof of whatever is necessary to make it his deed upon the plaintiff.

Special *non est factums* bring all the proof upon the defendant.

Savil. 71.
1. Salk. 274.
5. Com Dig. "Pleader"
(2. W. 18.)

And IT WAS AGREED BY ALL, that the deed cannot be an *escrow* to the party himself.

(a) *Qu.* 5. Co. 84. b.

MICHAELMAS TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt.* *Chief Justice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Justices.*

Edward Northey, *Esq.* *Attorney General.*
Simon Harcourt, *Esq.* *Solicitor General.*

* Culliford's Case.

Case 311.

If an *appeal* of murder be removed by *habeas corpus* and *certiorari* into the king's bench, and the *appellee* be admitted to bail, he cannot be discharged on appearing to his recognizance, and *producing* a release from the prosecutor; but must be arraigned upon THE RECORD, and then plead *the release*, or *autre-fois acquit.*

CULLIFORD was acquitted upon an indictment of *murder* in the country; and, on an appeal brought, time was given by the Judge of assize until the next assize to plead. In the interim the appellant brings a *habeas corpus* and *certiorari* to remove the record and body of the appellee up hither; and at a Judge's chamber the parties agreed; so that the appellee was let go upon bail. The agreement being now perfected, and *a release* given by the appellant, and the appellee appearing upon his recognizance,

EYRE moved to have him discharged, on producing the release, and a counsel appearing for the appellant to consent to it.

But PER CURIAM, The *certiorari* and *habeas corpus* must be returned here. When we are thus possessed of the record, he must be arraigned upon it, and then he may plead his release; or if, at the return thereof, the appellant be not ready to arraign him, and do not appear, he shall have a *scire facias* to bring him to do it; and if he do not come at the return thereof, he shall be nonsuited. And

S. C. 1. Salk. 382. S. C. 3. Salk. 89. Ld. Ray. 434. 556. 1289. Stra. 855. 858. 11. Mod. 216. 228. 12. Mod. 20. 109. 157. 349. 374. 642. 1. Salk. 61. Carth. 16. 331. 395. Skin. 48. 443. 553. 634. 670. 2. Hawk. ch. 28 sect. 4. ch. 23. sect. 124. ch. 35. sect. 2. Stanf. 70. Kely, 91. Stra. 854. 5. Burr. 2645. 2648. 1. Com. Dig. "Appeal" (G. 5.).

CULLIFORD'S CASE.

the appellee is not thereby discharged; for here being a record against him, he shall thereupon be arraigned at the suit of THE QUEEN, and then he may plead *autre fois acquit*: for there being a record against him, that record must be discharged. And it was compared to the case where two indictments are against a person for one fact, as one by THE CORONER'S INQUEST, and the other by THE GRAND JURY, and he is arraigned, tried, and acquitted

*[220] upon one of them, * yet he is not thereby discharged, but shall be arraigned *de novo* upon the other, to which he may plead the former acquittal on the other. But now the course is in THE OLD BAILEY, and is indeed the most easy and fair, to try him upon both the indictments at once.

Case 312. The Queen *against* Weekes.

Return of a *rescous* quashed for repugnancy.

2. Salk. 586.

Ante, 141.

2. Hawk. ch. 21. f. 4.

THE SHERIFF returned a rescous thus: "*Non est inventus* "*in balliva mea*," and "*executio residui istius brevis patet in* "*schedulâ huic brevi annex.*" and that was of a taking and rescous.

And the return of the rescous was quashed for the repugnancy. For PER CURIAM, After *non est inventus* all the rest is idle, and there remains no more for the sheriff to do.

BUT NOTE, upon the return of "rescous" the sheriff always concludes, that after the rescous made the defendant *non est inventus in balliva*, &c.

Case 313. * The Queen *against* Elizabeth Franklin.

When a statute gives a penalty to *the king* and to *the informer*, and the informer does not sue within *the year*, the King may sue for the whole penalty at any time within *two years*.

S. C. 1. Salk. 370. 317.

S. C. 3. Salk. 351. S. C. 1. Ld. Ray. 1038. 1. Salk. 373. Ante, 128. 1 Show. 354. Sess. 6. 4. Mod. 1[illegible] 146. 5. Mod. 425. Carth. 163.

ELIZABETH FRANKLIN was indicted at the quarter sessions of a borough for exercising the trade of a goldsmith, not having served seven years apprenticeship to it.

EYRE moved to quash it; for it appeared that it was a year after the offence committed.

But PER CURIAM, Upon a view of the statute 5. *Eliz.* c. 4. where a moiety of the penalty goes to the informer, a prosecution upon that statute must be within a year by the informer; but where it is purely at suit of the queen she has two years; and where the penalty is distributed, a moiety to the queen and a moiety to the informer, and no prosecution within the year, the queen has another year, and shall have all the forfeiture.

An indictment on 5. *Eliz.* c. 4. will lie at a *borough sessions*.

6. Co. 19. Cro. Car. 316. Cro. Eliz. 737. 6. Com. Dig. "Trade" (D. 7.). and see Farten *qui tam* Williams, Cowp. 36.

A SECOND EXCEPTION was, that the quarter sessions of boroughs ought not to receive such indictments, but only those of the county at large: and for this he quoted the case of *The King v. Taylor*,

and

and another case in the thirteenth year of *William the Third*, where the indictment was quashed upon that exception.

The Queen against Elizabeth Franklin.

But PER CURIAM, The contrary has been settled on debate since, and there is no danger of oppression, because a *certiorari* lies.

A THIRD EXCEPTION was to the caption, and was this: "*Juratores, &c. super sacramentum suum præsentant existit.*" And this being nonsense, the indictment was quashed for it.

A caption "*juratores super sacramentum suum, &c.*" is bad.—1. Salk. 370. and 371.

Anonymous. Case 314.

PER CURIAM. When one removes an indictment by *certiorari*, the defendant ought to appear above the Term it comes in, or else he forfeits the recognizance which he enters into for the trying of it; but such appearance need not be in person, but by his clerk, and without it he cannot have a copy of the indictment to quash it.

A defendant who removes an indictment by *certiorari* must appear during the Term in which the writ is returned.

Ante, 42. 114. 1. Salk. 370. 380.

* [221]

* Anonymous. Case 315.

NOTE LIKEWISE, One cannot move to quash an indictment for a fault in the caption the same Term it comes in.

Anonymous. Case 316.

PER CURIAM. After writ of error brought, if the record be not certified at the return of it, upon certificate thereof from the officer of the court in which the writ of error [illegible] returnable, the other may have a writ *de executione judicii* of course, and the party cannot hinder execution without a new writ of error.

If the record be not certified on the return of a writ of error the party may take out execution.

1. Salk. 265. Stra. 886 5. Com. Dig. "Pleader" (3. B. 12).

Boisloe *against* Baily. Case 317.

TRESPASS FOR ASSAULT, BATTERY, AND WOUNDING. The defendant, as to the *vi et armis*, pleads *not guilty*, and as to the residue of the trespass pleads a submission to an award of all controversies, and sets forth *an award* made, *viz.* that the defendant should provide two fowls at his mansion-house in *Old-Bedlam* in *London*, to be eat by the plaintiff and his friends on *Wednesday* or *Thursday* in such a week, *in satisfaction* of the said trespass; and avers, that on *Thursday* in the said week he did provide two fowls at his mansion-house aforesaid, &c. but that the plaintiff nor his friends did not come.

The defendant may plead the award of a *collateral thing in satisfaction*, without averring that the award is performed.

S C. 2 Salk. 76. S. C. Holt, 711. T. Jones, 65. 158. Carth. 159. 188. Skin. 679. 1. Salk. 76. Kyd, 94.

To this it was replied, that *Wednesday* was the day appointed for the fowls, and a traverse that it was *Wednesday* or *Thursday*.

To this there was a rejoinder and demurrer.

BOSILOR *against* BAILY.

IT WAS URGED, that the bare award in this case was not a good bar without an execution of it, because it was of a collateral thing, of which the plaintiff could not have an action: and for this was quoted *Keilw.* 121. for an accord without a satisfactory consideration cannot be good; and if we have no remedy for what is awarded, it is in the power of the defendant whether he will satisfy us or not. An accord, and tender and refusal, is not a good bar *(a)*; and the reason is, because an action would not lie upon the accord for the plaintiff (*b*).

TO THE FIRST EXCEPTION it was answered by HALL, *Serjeant*, that indeed the old books did hold, that an award of a collateral matter in satisfaction of damages, was not a good plea in bar without alledging performance; because, as was then held, no remedy lay upon the award: but that reason fails; for though it be true that no remedy lies upon the award itself for it, yet an *assumpsit* lies upon the submission, which is a promise of performance.

And to that opinion HOLT, *Chief Justice*, did very strongly incline; for he said, it had been often held of late days, that the submission mutual was an actual mutual promise of performance (*c*); and if this had been upon a bond awarding a collateral matter, it had been a good award, because the party has remedy upon the bond of submission; and if there be remedy for the thing awarded, it need not be averred executed.

A submission of trespass need not notice the *vi et armis*.

A SECOND EXCEPTION was, that the trespass declared on was *quare vi et armis*, &c. and there was no consideration or submission of the *vi et armis*, and so this award could not be a bar to the declaration.

HALL, *Serjeant*, *contra*. As to the not submitting the *vi et armis*, it concerns the queen, and cannot be submitted by the parties.

On an award that *A.* shall give *B.* a dinner on *Wednesday* or *Thursday*, notice is necessary.

A THIRD EXCEPTION, that it being at the election of the defendant to provide the fowls on *Wednesday* or *Thursday*, he ought to give the plaintiff notice on which of the days he would provide them, and the time of the day on which he would have them ready; for otherwise, if the plaintiff come on *Wednesday* to his house with his friends, the defendant might say he should not provide the fowls until next day, and if the plaintiff did not come on *Wednesday* the defendant might say he provided them the day before.

HALL, *Serjeant*, answered, that the giving of notice was not necessary; for the defendant by the award had the advantage of an election given him.

(*a*) See the Year-Books 9. *Edw.* 19. e. 17. *Edw.* 4. pl. 8. 9. Co. 79.

(*b*) See the Year-Book 16. *Edw.* 4. pl 8, 9. 1. Roll. Abr. 128. Stiles, 245.

(*c*) See 1. Ld. Ray. 122. 2. Ld. Ray. 1039. Kyd on Awards, 7.

A FOURTH

A FOURTH EXCEPTION was, that in this case it was not enough to say, that he had provided the fowls, but that he should have tendered them; for the words of the award are, "*provide* and *give*, &c." In pleading an award of a collateral thing; qu. if a tender should be stated.

HALL, *Serjeant*. This objection, *viz*. the want of pleading a tender, falls to the ground, if the answer to the first objection be good.

* [222]

A FIFTH EXCEPTION * was, that there is no *venue* laid where the fowls were provided, it is only laid to be at the defendant's house in *Old Bedlam*, in *London*; and in *London* the *venue* ought to be laid in *the ward*, which is like a hundred; or in a parish at least, which is in the nature of a vill in another county. In pleading an award of a collateral thing in satisfaction; qu. if the place of performance ought not to be stated.

HALL, *Serjeant*, as to this objection answered, that the not laying a *venue* was helped by verdict.

To which HOLT, *Chief Justice*, said, that the want of a *venue* is only curable by such plea as admits the fact for the which it was necessary to lay *a venue*; as if debt be upon a bond, and no *venue* laid where the bond was made, on demurrer to it, it will be ill; but if the defendant plead *a release* whereby the bond is admitted, that helps the declaration.

But in this case, by reason of the frivolousness of the action, THE COURT gave no judgment, but wished them to compromise the matter.

Anonymous. Case 318.

PER CURIAM. If one pretending to have title to land give security to the tenants to save them harmless upon paying him the rent, and afterwards another recover in ejectment against them, they have no remedy upon the security until recovery of the mean profits, which is from the time of the action brought, and without an actual entry there can be no recovery of the profits. If security be given to tenants on paying their rent, and they are afterwards ousted, they have no remedy until the mean profits are recovered.

Anonymous. Case 319.

PER CURIAM. If a man sign a lease in one county or vill of lands in another, yet the jury must come from the place where the land lies in an ejectment upon such lease. The venue in ejectment must be where the land lies.

Ante, 130. Post. 309. 1. Salk. 273. 2. Salk. 645.

Anonymous. Case 320.

PER CURIAM. A new trial is never granted for want of evidence whereof the party was apprised, and which he might have had at the trial. New trial. Ante, 22. Post. 242.

Anonymous.

Case 321.

* Anonymous.

If only part of the debt be levied on a *fi. fa.* the plaintiff may have a *ca. sa.* for the residue.

PER CURIAM. If one levy part of his debt by *fieri facias*, he cannot after take out a *capias* for the whole; but his way is, to return the *fieri facias*, by which it may appear how much is levied, and then take a *capias ad satisfaciendum* for the residue (*a*).

(*a*) See the case of Walter *v.* Dennis, Cro. Eliz. 344. 1. Roll. Abr. 904. 3. Bl. Com. 417.

Case 322.

Anonymous.

Tithe fish.

Cro. Car. 339. 1. Lev. 179. 1. Sid. 278. 1. Vent. 5. 5. Bac. Abr. 63. 3 Com. Dig. "Dismes."

PER CURIAM. FIRST, No tithe is due for *fish* of common right, but it may be by custom (*a*).

Wood is titheable by custom.

Carth. 303. 379. Skin. 51. 239. 341. 356. 560. 1. Keb. 454. 2. Keb. 2. 447.

SECONDLY, No *wood* is titheable of common right, but only by custom (*b*).

(*a*) See Rex *v.* Carlyon, 3. Term Rep. 385.

(*b*) See Doctor and Student, dial. 2. c. 55. 13. Co. 13.

Case 323.

Anonymous.

After a *nonsuit* in *replevin*, it is too late to object that the avowry states a *particular estate*, without shewing its *commencement* or a seisin *in fee*.

Ante, 158.

5. Mod. 150.

IN REPLEVIN the avowant said, that he was possessed for years, and made an under-lease, reserving rent, &c. for which arrear he distrained. The plaintiff was nonsuited, and a return irreplevisable awarded.

The exception taken upon the return of the writ of enquiry was, that the avowry was naught, for that the avowant pleaded a *particular estate*, without shewing who had *the fee*, and the commencement of the particular estate.

But though that were bad, yet being after the nonsuit it was too late; for the interlocutory judgment is such on which a writ of error lies, as in judgment on a writ of dower.

Case 324.

Stanyon *against* Davis.

Error of judgment in the marshal's court, &c.

Post. 227.

See Danv. Abr. tit. "Error," post. 303.

S C. 1. Salk. 404.

S.C. 11. Mod. 7.

S C. Holt, 13.

S. C. 2. Ld. Ray. 795.

ERROR OF A JUDGMENT in *the Marashalsea Court*, wherein the plaintiff declared, that at such a day, in such a parish, in the county of *Middlesex*, he delivered it to the stable of the defendant thus, "*præd.* DAVIS *com. hospitat. adtunc et ibidem existen. in stabulum* "*deliberavit*" a certain gelding, to be by him safely kept at a reasonable rate, and to be safely re-delivered by him to the plaintiff; that the defendant *adtunc ibidem tam negligenter* the said gelding did keep, that through his defect it was taken out of his inn, and so immoderately rid and whipped that he was quite spoiled. Verdict and damages for the plaintiff, and judgment for him below.

RAYMOND

RAYMOND and CHESHIRE, upon a writ of error being brought, at several times, excepted:

STANTON against DAVIS.

FIRST, That the horse, for aught that appears, was put into the defendant's stable without his privity, and if so he was not bound to take any care of it; for as the declaration is worded, it is to be understood that it was delivered into his stable, he being a common innkeeper; for *præd. D. com. hospitator. existen.* must be taken in the ablative case.

Words indifferent shall be taken in that sense which makes the declaration good.

But the words being indifferent to an ablative or dative, and taking them in a dative making the declaration good, and the other bad; *per* POWELL, POWYS, and GOULD, *Justices*, *absente* HOLT, *Chief Justice*, it shall be taken in that which makes it good. * [224]

SECONDLY, That no place was laid where the immoderate riding was, nor that it was *within the jurisdiction* of the inferior court: and it was laid down for a rule, and agreed to by THE COURT, that whatever is essentially necessary to maintain an action, if the action be brought in *an inferior court*, that matter must be averred to have been *within their jurisdiction*, otherwise they have no* jurisdiction; for whatever is not averred to be *within their jurisdiction*, shall be intended out of it.

In an action on the case in an *inferior court* for negligently keeping the plaintiff's horse, whereby he was taken out of the defendant's stable and immoderately rode, it is not necessary to aver that the *immoderate riding* was *within the jurisdiction*; for the breach of the *contract* is the *gist* of the action.

IT WAS ALSO AGREED clearly, that if that which is the *gist* of the action, and the complete cause of it, be laid within the jurisdiction, and the declaration shews further matter, which is only aggravation or consequential damage without which the action would have lain, such matter need not be averred to be *within the jurisdiction*; as in an action on the case for calling a woman *a whore*, whereby she lost a marriage, there not only the words, but also the loss of marriage, must be alledged to be within the jurisdiction, because the one without the other will not maintain the action; and there one may confess the words and traverse the damage (*a*). So in trespass by a master for the battery of his servant, whereby he lost his service; the loss of service, as well as the battery, must be laid within the jurisdiction (*b*). But in an action by a tradesman for calling him *a cheat* in his trade, whereby he lost his customers; there the loss of customers need not be alledged within the jurisdiction, because the words are actionable without it, and it is only aggravation (*c*). In an action for arresting one in another man's name, without consent of the other, *per quod* his creditors came all and arrested him, it is not needful to alledge that the creditors came upon him *within the jurisdiction*, because the arresting in another's name, without the other's consent, is in itself actionable (*d*).

S. C. Salk. 404. Ante, 3. Post. 306. 1. Saund. 74. 1. Vent. 243. 1. Sid. 87. 1. Lev. 137. 2. Jones, 230. 2. Lev. 87. 3. Com. Dig. "Courts" (P. 9.)

(*a*) 1. Sid. 85. 95. Ray. 63. 1. Lev. 69. 153.

(*b*) So a declaration in an *assumpsit* in an inferior court for money had and received, must not only alledge that the defendant *promised to pay* within the jurisdiction, but that the money was had and received within the jurisdiction, Trevor *v.* Wall, 1. Term Rep. 151.—See also Waldock *v.* Cooper, 2. Wils. 16. Fitzg. 44. 9. Mod. 77. Stra. 827. Ld. Ray. 1555.

(*c*) 1. Roll. Abr. 546. 1. Cro. 570.

(*d*) 1. Jones, 448.

THIRDLY,

If a person deliver his horse to a stable-keeper, to be by him safely kept, at a reasonable rate, and to be safely re-delivered, and the horse, by the negligence of the stable-keeper, be taken out of the stable, and so immoderately rode as to be spoiled, an action lies for his neglect in not safely keeping the horse, according to the contract.

THIRDLY, The doubt was, Whether the defendant's neglect, in suffering the gelding to go out of his custody, was a complete cause of action, without any regard to the riding, &c.

WARD urged, that the sole cause of action was the not keeping the gelding safely, according to the contract; and for this he quoted *the Register*, 106. and *Rast. Ent.* 3. and then it being a nonfeasance, no *venue* need be where the nonfeasance was (*a*).

And in *Easter Term* last, upon the arguing of this case, HOLT, *Chief Justice*, asked the Counsel for the plaintiff in error, whether, if the original declaration had been in this court, they would venture to demur to it for not shewing the place the horse was immoderately rid in? And he said, sure they would not. And then if this were a good declaration in a superior court, without that, it will not be necessary to aver it within the jurisdiction of an inferior court in an action brought there.

CHESHIRE answered, that the inference did not follow; for if *indebitatus assumpsit* be in a superior court for goods sold and delivered, though no place be laid where the sale or delivery was, yet it is no cause of demurrer, but the not alledging it to be within the jurisdiction of an inferior court would be fatal (*b*).

But PER TOTAM CURIAM, The judgment was affirmed; for the neglect of not keeping according to the contract is the sole *git* of the action; for if the declaration had been, that the defendant did so negligently keep the horse that he was taken out of his stable,
* [225] and rid into * *Somersetshire*, to his damage, &c. the action would lie: or that he so negligently kept him, that through his neglect he was beat or abused, or wanted reasonable provender in his inn. And the sole cause of action is his neglect of due care of him.

The judgment was affirmed.

(*a*) See 1. And. 139. and the case of Walker *v.* Ashwood, Michaelmas Term 10. *Will.* 3. in the king's bench.

(*b*) See the case of Paston *v.* Ledham, Year-Book Mich. Term, 37. *Hen.* 6. page 2. b. pl. 4.

Case 325. Anonymous.

How a special verdict finding original deed shall conclude, where *the counterpart* was in evidence.

NOTE, The Chief Justice remembered the case of *Mayo v. Combe* (*a*), in my LORD HALE's time, where the counterpart of an ancient deed was admitted in evidence; and a special verdict being found in the case, finding the original deed, it concluded "*prout* "by the counterpart it did appear." And this was so done to preserve the precedent.

In what cases the counterpart of a deed is good evidence. Post. 248.

And now ALL THE COURT held, that the counterpart of an ancient deed which might be lost was good evidence with other circumstances, but not of itself without other circumstances; but that a counterpart of a deed leading the uses of a fine was of itself good evidence.

Carth. 79, 80. 142. 181. 220. 225. 265. 346. Skin. 15. 24. 82. 174. 205, 431. 579. 584. 623, 624. 639, 640. 672, 673. 1, Mod. 4. 94. 114. 5. Mod. 211. 386. 4. Com. Dig. "Evidence" (B. 4.).

(*a*) Hard. 119. 1. Lev. 25. 3. Keb. 477.

Fox

Fox *against* Tilly. Case 326.

DEBT UPON A BOND conditioned to save the plaintiff harmless against all escapes which he *had* suffered as WARDEN OF THE FLEET PRISON.

And on demurrer to the rejoinder, which was in itself a departure from the plea, which was a *non fuit damnificatus*, and a special damage replied, and continuance given to the first day of this Term,

THE COURT took a diversity between a bond to save harmless against *future escapes*, for that would be void, and a bond to save harmless against *past escapes*; for though it were unlawful to suffer them, yet one may contract to indemnify one against a penalty already incurred against law.

A bond given to save a gaoler harmless against *past escapes* is good, but not against *future escapes*.

2. Salk. 438. 653. 5. Com. Dig. "Pleader" (2. W. 25.).

AND NOTE, Here the Court was informed that the plaintiff was dead, and therefore they ought not to go to judgment.

To which they answered, that if that were so, the defendant must come and plead it as a plea *puis darrein continuance*, and make *oath* of the truth of it, otherwise they would not take notice of it; and if the plaintiff were alive on the *continuance-day*, they might well give judgment.

If a plaintiff die between the day of *nisi prius* and day *in bank*, the fact must be pleaded *puis darrein continuance*.

Inst. Leg. 604.

And accordingly the plaintiff had judgment. For, PER CURIAM, if he die before the *first day of Term*, we cannot take notice of it without it be pleaded as *puis darrein continuance*; and if he were alive the *first day of Term*, the judgment shall relate to that day.

Linch *against* Hooke. Case 327.

PER CURIAM. If *A.* give bond by name of *B.* and he is sued by name of *B.* he may plead *misnomer*, and the other must plead that he made the bond by the name of *B.* and estop him by demanding judgment whether against his deed he ought to be admitted to say his name is *A.*; and then the defendant may rejoin, and say, that he made no such deed: and this the defendant must do without *oyer*; for if he pray *oyer*, he admits his name to be *B.*

If *A* make a bond in the name of *B.* and is sued by the name of *B.* he may plead *misnomer*.

S. C. post. 311. S. C. 1. Salk. 7. Ante, 28.

* [226]

* Anonymous. Case 328.

IF A WRIT be returnable in one Term, the defendant ought to put in bail in that Term, that is, at any time before the *essoin-day* of the next Term, and until then it is irregular to proceed upon the bail-bond; but one in the mean time may take an assignment upon it, and take out a warrant.

It is irregular to proceed on bail-bond until the essoin-day of the next Term.

Stra. 399.

Andr. 374. 1. Com. Dig. "Bail" (Q. 1.).—See 4. & 5. *Anne*, c. 16.

Case 329. **Adams *against* Terre-tenants of Savage.**

If an administrator bring a scire facias on a judgment by his intestate, to warn the tenants, and the sheriff returns several terre-tenants, they cannot all appear and plead in abatement jointly.

THE CASE being moved again this Term, it appeared on the record to be thus:

A *scire facias* was brought by an administrator upon a judgment by his intestate, to warn in the tenants of such lands as were *Savage*'s at the time of the judgment, &c. The sheriff returns several *terre-tenants*; among others *J.* and *S.* his wife, tenants of a capital messuage called *B.* and also of the manor of *B.* All the tenants appear, and plead *in abatement* jointly, *viz.* that one *G. T.* is tenant of the freehold of the manor of *B.*; and so pray judgment of the writ, *et quod cassetur.*

PER CURIAM. The plea is clearly bad.

2. Keb. 351. 388. 2. Keb. 55. 728. 3. Keb. 25. 50. 3. Lev 205.

FIRST, Because they all join in the plea, when they are returned several *terre-tenants*; for if *A.* be returned *terre-tenant* of one parcel, and *B.* of another, *A.* cannot plead that another is *terre-tenant* of another parcel, and not returned, except only as far as it affects himself, but not *quatenus* it affects *B.*

If on a scire facias against terre-tenants the sheriff return, among others, John and Sarah his wife as tenants, a plea in abatement that G. T. is the tenant is bad; for it is pleading non-tenure by implication.

SECONDLY, This, as the record is, is pleading a *non-tenure* by implication; for if *G. T.* be tenant of the freehold of the manor of *B.* of which *J.* and *S.* his wife are tenants returned, that is an implication that *J.* and *S.* are not tenants of it, and therefore bad; for a *non-tenure*, though it were expressly pleaded, is not a good plea to a *scire facias* upon a judgment in a personal action, because it is directly to falsify the return of the sheriff. It has been a question, Whether a special *non-tenure* can be pleaded in that case? but that it may is now settled (a). But in a *scire facias*, to have execution of a judgment in a real action one may plead *non-tenure* against the return of the sheriff, because there the freehold, so much favoured in law, is at stake.

S. C. ante, 134. 199. S. C. 1. Salk. 40. S. C. 2. Salk. 601. 679. S. C. 3. Salk. 321. S. C. Lilly Ent. 898. Post. 256. 2. Keb. 587. 636, &c. 1. Sal. 1. Mod. 28.

Besides, as to the pleading of this *in abatement*, if the sheriff has returned all the *terre-tenants* in his county, it is altogether improper to plead *in abatement* that there are other tenants in another county not returned; because, in that case, there are none to be summoned by that sheriff; and the sheriff having returned all in his county, has done his duty. But if it be pleaded, that there are other tenants in the same county, the regular and neat way is to conclude, by demanding judgment, if they ought to be put to answer *quousque* the other be summoned: for which see the precedent in the case of *Jefferson v. Dawson* (b). It is true, that precedents are both ways, but judgment is never according to the conclusion here, *quod breve cassetur*; but only to stay *quousque*; for judgment shall not be to abate a writ but where the plaintiff may have a better.

(a) See the Year-Books 8. *Edw.* 4. pl. 19. 9 *Hen.* 5. pl. 11. and the case of Flud v. Pennington, Cro. *Eliz.* 872.

(b) 2. Saund. 23.

And

THE ATTORNEY GENERAL, in his behalf, moved for *an attachment* against the justices for *a contempt* of THE TOLERATION ACT, alledging, that a qualification in one county is a qualification all over *England*. PEAT'S CASE.

But PER CURIAM, The *act of Conventicles* is still in force, and the justices of peace have power of executing it against such as do not qualify themselves according to THE TOLERATION ACT, which act only enjoins the justices of peace to acquit such as do comply with THE ACT OF TOLERATION. So they being judges of the matter, if they * wrong you, you have your remedy by *certiorari* (*a*), or appeal to the sessions, where the whole fact may be heard and examined over again; which examination of the fact shall be final by the very words of the statute; and if they err in a matter of which the law makes them judges, it would be most unreasonable to grant *an attachment* for such error. * [229]

THE ATTORNEY GENERAL then moved for a *mandamus* to the justices to suffer him to preach there, he qualifying himself according to THE ACT OF TOLERATION. A *mandamus* does not lie to suffer a dissenting minister to preach.

But THE COURT denied it; for a *mandamus* is always to do some act in execution of law; but this would be in the nature of a writ *de non molestando*, and that contrary to a conviction standing against you, which shall be looked upon as legal while it stands.

THEN they moved for a *mandamus* for the justices to take security from him not to become chargeable to the parish: A *mandamus* does not lie to oblige a dissenting minister to give security.

Which was also denied; for that matter is only to be upon complaint of the churchwardens and overseers of the poor.

AND THEY HELD, that, by THE TOLERATION ACT, it suffices not that the licence of such preacher be inrolled at the quarter-sessions of one county to enable him to preach in any other county; but it ought to be at such quarter-sessions as would otherwise have conusance of the matter upon the *statute of Conventicles*, and that is the sessions of the county where the fact is committed (*b*). How the qualification of a dissenting preacher shall be inrolled.

THEN they moved for a *mandamus* to the sessions to state the fact specially. A *mandamus* does not lie to sessions to state a *special case*.

But it was denied, for that the statute excludes all others from examining the fact.

AND, FINALLY, they moved for a *procedendo* to a *certiorari* already brought by them, in order to appeal to the sessions: which was granted. A *procedendo* shall be awarded to enable the parties to appeal.

(*a*) It is settled, that a *certiorari* will lie upon this statute, Rex *v.* Morley and Others, 2. Burr. 1040.

(*b*) But by 10. *Anne*, c. 3. s. 9. "If "a dissenting minister be qualified ac- "cording to the Toleration Act, he may "officiate in any congregation, although "the same be not in the county wherein "he was so qualified, provided the meet- "ing-house ha[s] been registered, and a "certificate of his having qualified left "with the clerk of the peace of the "county in which he qualified." See also 19. *Geo.* 3. c 44. 1. Hawk. P. C. ch. 16. sect. 22. to 33. 7th edition.

Case 333. **Anonymous.**

Proceedings on bail-bond set aside, because no *cepi corpus* returned.

PER CURIAM. The ancient rule was, that a bail-bond could not be put in suit until a rule was obtained to amerce the sheriff for not having the body forthcoming.

And now proceedings upon the bail-bond were set aside, because there was no *cepi corpus* returned (*a*).

(*a*) See 1. Sid. 23. 2. Mod. 84. But this practice of giving a rule for the sheriff to bring in the body before the plaintiff could take an assignment of the bail-bond, is now altered by the statute 4. & 5. *Anne*, c. 16. s. 20. which enacts, "that the sheriff, at the request and costs of the "plaintiff, shall assign to the plaintiff the "bail-bond, or other security taken "from the bail, by indorsing the same, "and attesting it under his hand and seal, "in the presence of two or more wit- "nesses, which may be done without "stamp, provided the assignment so in- "dorsed be duly stamped before any "action brought thereon; and if the said "bail-bond or assignment, or other secu- "rity taken for bail, be forfeited, the "plaintiff may bring an action thereupon "in his own name: and the Court may, "by rules, give such relief to the plaintiff "and defendant in the original action, "and to the bail upon such bond, as is "agreeable to justice and reason: and "such rules shall have the nature and "effect of a defeasance to such bail-bond, "&c." See Barnes, 77. 2. Stra. 1262. 2. Black. Rep. 876. Tidd's Practice, 155.

Case 334. **Brewster *against* Weld.**

A *scire facias* may be sued by any person who is prejudiced by A PATENT, as well as by the king.

4. Inst. 72.
2. Vent. 244.
3. Lev. 221.
2. Keb. 373.
Bro. *S.i. Fac.* 104. acc.

SCIRE FACIAS out of chancery, returnable in THE QUEEN'S BENCH, to repeal letters patents of the rectory of *Aldgate*.

It was moved, that the sheriff might return his writ.

And here IT WAS RESOLVED, that if letters patents be to the prejudice of another, he may have a *scire facias*, upon the inrolment thereof in chancery, to have them repealed, as well as THE QUEEN may; as if a fair be granted to the damage of mine, I may have a *scire facias* to repeal such grant.

Dyer, 197. 5. Com. Dig. "Patents" (F. 6.). 2. Vent. 344. 3. Lev. 220. Vid. 5. Com. Dig. "Patent" (F. 7.).

In what manner a *scire facias* out of chancery to repeal letters patent shall be returned.

AND THEY SEEMED LIKEWISE TO HOLD, that a *scire facias* upon a record in *chancery* was not returnable here.

But clearly after a writ issues out of *chancery* returnable in another court, that court into which it is returnable has jurisdiction of it, and not *the chancery*, nor can the *chancery* supersede such writ; but all the irregularity, both in issuing it out and in the return of it, is solely examinable in the court in which the writ is returnable; which, if the writ be legal, will hold plea upon it, but otherwise will quash it.

*[230] But the * motion being the *quarto die post*, all which day the sheriff has to return the writ, THE COURT would not make a rule.

The same motion being made the next day, the Court was informed, that THE CHANCERY had superseded the writ; whereupon, in some heat, they ruled the sheriff to return it, or to return the *supersedeas*, if he depended on it that it would excuse him.

The day after, the sheriff having got the writ back from THE CHANCERY, returned it *scire feci*, and brought it into court.

Anonymous. Case 335.

A FEME COVERT may plead "*non assumpsit*," and give *coverture* in evidence, because *coverture* makes it no promise; so she may plead "*non est factum*" to a bond, and give *coverture* in evidence (*a*). A married woman may give *coverture* in evidence under the *general issue*.

Post. 218. Ray. 395. 12. Mod. 609. 1. Show. 50. Co. Lit. 132. Lut. 23. 1. Salk. 8. Theol. Dig. l. 12. c. 12. Stra. 811. Com Dig. "Abatement" (E. 6.). (F. 2.). (H. 42. Com. Dig. "Pleader" (2. W. 21.).

(*a*) See Year-Book 4. *Hen.* 4. pl. 30. Com. Dig. "Pleader" (2. A. 1.). Milner *v.* Milnes, 3. Term Rep. 627. Gilb. Evid. 162. Dixon *v.* Davis, 1 Stra. 480. Westbrooke *v.* Strutville, 1. Stra. 79.

Cockroft *against* Smith. Case 336.

THE DEFENDANT in a scuffle bit off the forefinger of an attorney's right hand: Bail in trespass. Post. 266.

And in trespass, with a special *ac etiam* by a judge's warrant, the question was, Whether the bail should not justify themselves to a sum suitable to the *ac etiam*? 1. Mod. 2.

And PER CURIAM, He was not held to that, he being very poor.

Gibbon *against* Dove. Case 337.

PER CURIAM *et* OMNES CLERICOS. Upon a writ of error, and bail put in, the defendant has *twenty days* to except against the bail, which exception ought to be entered in the clerk of the errors book. Time to except against bail put in upon a writ of error, &c.

He ought further to take out a rule to serve upon the attorney or agent of the plaintiff to put in better bail; but that rule need not be served within the twenty days, but it must be before execution sued out for want of bail. S. C. 3. Salk. 56. Ante, 24. 1. Com. Dig. "Bail" (K. 4.).

NOTE, It was said, that there ought to be notice of the exception within twenty days. Notice of the exception.

Jacob *against* Dallo. Case 338.

PROHIBITION was moved for to THE SPIRITUAL COURT, to stay a suit there about the right of disposing of *pews* in a church. A suggestion to prohibit the spiritual court from proceeding on a right to *a pew*, must shew whether THE CHURCH was presentative or donative.

The suggestion was, that such A CORPORATION were *impropriators* of it, and time, &c. used to repair all the pews, and *ratione inde* had the disposal of them.

But because it did not appear to THE COURT, whether it were *presentative* or *donative*, or with *cure of souls* or not, they would do nothing in it. 1. Keb. 457.

A church, whether *donative* or *stipendiary*, may have the cure of souls.

S. C. 5. Mod. 436.
S. C. 2. Salk. 551.
S. C. 7. Mod. 8. S. C. 2. Ld. Ray. 755. S. C. 12. Mod. 233.

But they said, that a *donative* might be with cure of souls, as the chapel in the Tower of London: and that there is also another kind of church, which is neither *presentative* nor *donative*, but *stipendiary*, and yet has *cure of souls*: as if there be an impropriation, and it has no vicarage, but only a certain stipend is given yearly to him that serves the cure; and that is merely dative, and at the pleasure of the impropriator.

*[231]

Anciently no *pews* in churches.

* Note likewise it was said, that anciently there were no *pews* in churches, but only *forms*.

How a prescription in a corporation to a pew in a church may be pleaded.
1. H. Bl. Rep. 210. 1. Kyd on Corp. 296.

And that it had been a good prescription to say, "that time out "of mind the corporation did repair such an aisle of the "church, *ratione cujus* the mayor and aldermen sat there;" for though the right be in the whole body, the enjoyment may be in and enure to a select number.

Case 339. Anonymous.

Bail may take their *principal* at any time, even on a *Sunday*, to surrender him in their discharge.
Post. 247.
7. Mod. 77. 85. 98.
1. Atk. 239.
Tidd's Pract. 53 247. 1. Com. Dig. "Bail" (A.). 2. Hawk. P. C. ch. 15. s. 3. 1. Bac. Abr. 253. 2. H. Bl. Rep.

PER CURIAM. The bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge; they may take him up even upon *a Sunday*, and confine him until the next day, and then render him; for the entry in this court is *traditur in ballium*, &c. and the doing it on *a Sunday* is no service of process, but rather like the case where a sheriff arrests by virtue of a process of court on *Saturday*, and party escapes, he may take him upon *a Sunday*, for that is only a continuance of the former imprisonment (*a*).

(*a*) But see the case of Brookes v. Warren, Easter Term, 19. *Geo.* 3. 2. Bl. Rep. 1273.

Case 340. Knight *against* Burton.

An award that *jointenants* shall make *partition* by mutual conveyances is good, although it do not point out what *part* each of the parties is to have.

S.C. 1. Salk. 75.
Post. 244.
Kyd on Awards, 38.

DEBT upon bond conditioned for performance of an award, which was set forth, and a breach assigned: and upon demurrer

Parker took exception:

First, That the award recited, that the parties were *jointenants* of such land, and ordered that they should make *partition* by mutual conveyances.

This was said to be uncertain, and not making an end of the matter by shewing what moiety, or part, the one should have, and what the other.

To which it was answered, and resolved, that it was well enough; for as they were *jointenants* before, they would now become *tenants in common*.

Secondly,

SECONDLY, It was objected, that could not be; for it was further awarded, that the one ſhould have *unam dimidiam partem ſive medietatem*; which ſhews they intended ſomewhat more than a *tenancy in common*, but left it uncertain; for *dimidia pars* is a moiety in certainty, and *medietas* is a moiety uncertain; and in this very award, they, in other matters, uſed "*medietas*" for a moiety in certainty; as *medietas* of the profits of ſuch a ſhip to be delivered, which is to be underſtood of a moiety divided, for otherwiſe it could not be delivered.

How "*dimidia* "*pars*," or "*medietas*" ſhall be reſpectively taken.

But PER CURIAM, "*Dimidia pars*," or "*medietas*," ſhall be reſpectively taken for moiety divided or undivided, *ſecundum ſubjectam materiam*: as *medietas* of a thing to be delivered ſhall be underſtood a divided moiety, becauſe it cannot be delivered except it be divided; ſo *dimidia pars*, if it be ſuch a thing as cannot be reduced to a divided moiety, ſhall be underſtood a moiety undivided: as in *dower*, if a woman demand *tertiam partem*, and it be of ſuch a thing as is capable of having a third part divided made of it, it ſhall be ſo; but if it be of a *third part* of lands of tenant in common, mill, &c. it muſt be a third part undivided. * [232]

* THIRDLY, It was objected, that they awarded money to be paid, which of their own ſhewing upon the face of the award did not appear to be due; for it was, "Whereas ſo much money "has been diſburſed by the one party, *as is alledged*:" ſo that though if they had ſaid, "Whereas ſo much money has been diſ- "burſed," it would be intended that it appeared to them to have been ſo, yet when they go farther, and ſay, "as is alledged," they take away ſuch intendment; for they ſhew their certainty of it was only becauſe it was alledged, which might be without any proof, or allegation by any perſon whatever.

An award, that "whereas ſo "much money "had been diſ- "burſed, *as is* "*alledged*," is good.
Ante, 229.
Skinner, 156, 159. 188.

But IT WAS RESOLVED, that "*alledged*" ſhould be underſtood as alledged, and not controverted or diſproved by the other ſide.

FOURTHLY, It was objected, that it was awarded that a ſuit between the parties in chancery ſhould be diſmiſſed; which, as was urged, was ill, for that an award ought to be final, and that a ſuit in chancery might be diſmiſſed upon payment of coſts, ſo as the party might begin again. Indeed, if the diſmiſſing be abſolute it is final; but if it be diſmiſſed, as is frequently done there, without prejudice, the party may begin again; and therefore an award of diſmiſſing a ſuit in chancery is uncertain and not final, but is like the awarding that one of the parties in a ſuit at law be nonſuited, which is void.

An award that a ſuit between the parties in chancery ſhall be *diſmiſſed*, is good; for it ſhall be taken to mean, that the ſuit ſhall ceaſe *for ever*, and therefore *final*.
Ante, 33.

But PER CURIAM, It is true, an award that one of the parties be *nonſuit*, is void, for that is not *final*; but when an award is, that a ſuit commenced be *diſmiſſed*, that muſt be underſtood that it ſhall be diſmiſſed and ceaſe for ever; that is a ſubſtantial diſmiſſion and *ceſſer*, and not the ſhadow of one: as if the condition of a bond be to deliver up another bond by ſuch a day to be cancelled, and the

1. Salk. 74.
Kyd, 142.

KNIGHT *against* BURTON.

obligee before the day puts the first bond in suit, and obtains judgment thereupon, and at the day tenders it to be cancelled according to the letter of the condition of the second obligation, yet his obligation is forfeited. The word "dismissing" here is put in *Latin* "*dimittere*," with an ANGLICE "to discharge," and to discharge a suit is to release it, and therefore final. If an action be depending upon a bond, and, *puis darrein continuance*, the plaintiff release the action, that releases the duty. Besides, this award is, that what is awarded of the other side "shall be in full of all debts and demands then due and owing;" and the word "*demands*" extends to all things that the one party has a right to demand or exact of the other at the time of the submission; and the words "*due and owing*" do not qualify or restrain it to a debt, or other special demand, that is, more strictly speaking, a duty; for whatever a man has a right to demand of another, may well be said to be "due and owing" from the other to him; so it may extend to a right of entry into land, to a suit for partition, &c.

A stated rule in awards that are said to be *de et super præmiss.* Post. 244.

1. Salk. 70. Kyd, 113. 160.

NOTE, This was agreed to be a stated rule in awards that are said to be "*de et sup. præmiss.*" that if the words used in them be in their own nature more comprehensive, and so extensive to things not within the submission, yet they shall be intended that there was no other matter between the parties for them to lay hold on but what was submitted, if the contrary be not shown; so *e converso*, if the words are more narrow and less comprehensive than to take in all the * matter of submission, yet it shall be intended that no more was in controversy than what the words naturally comprehend, if the contrary be not likewise shewn.

* [233]

And judgment *nisi* was given for the plaintiff by THE WHOLE COURT.

Case 341. Selby *against* Greene.

In debt on bond, if the defendant, on oyer, discover that a material rasure has been made in the condition, and plead *non est factum*, and the plaintiff, perceiving the erasure to be detected, countermands notice of trial, yet the Court will not impound the bond. Post. 237.

THE OBLIGEE made a material razure in the condition of a bond (*a*), and afterwards brought an action upon the bond. The defendant having had *oyer*, and the bond being now in court, and the razure discovered, the defendant pleads "*non est factum*," and notice of trial was given; but when the plaintiff understood that the defendant had found out the cheat, and could prove it, he countermands the notice of trial.

DARNELL, *Serjeant*, now moved upon affidavits of this matter, that the bond should remain in the custody of the officer of the court until the cause were tried; for otherwise the plaintiff would stay until the defendant's witnesses were dead, and put this forged bond in suit against him, when he could by no possibility relieve himself against it: and now if he would try it by PROVISO, the plaintiff would be nonsuited, and might begin again.

2. Bulst. 247. 11. Co. 28. 5. Co. 23. Dyer, 261. 2. Roll. 30. Cro. Eliz. 546.

(*a*) See the case of Miller *v.* Master, 4. Term Rep. 320.; and Master *v.* Miller, 2. H. Bl. Rep. 141.

PER

PER CURIAM. If you had denied the deed, according to *Weymark's Case (a)*, it is to remain in court until the cause be tried; otherwise it shall only remain for the Term in which it is brought in: but the most it goes to is, that upon *imparlance* granted it should remain in court until the defendant pleads: as here, if it be by bill, the defendant after imparlance may crave *oyer*; and therefore there it must remain in court until the party is put to plea (*b*), that he may in that case have *oyer* of it. SELBY *against* GREENE. 2. Salk. 497. Vide post. 303.

And HOLT, *Chief Justice*, remembered *Sir Solomon Swale's Case* (*c*) in his time, where a deed, upon evidence, was found not to be the defendant's deed, and by consequence forged; and it was insisted on, that the Court ought to cancel it: yet the Court denied it, because there might be error in the proceedings for which the verdict might be set aside, and then the bond would stand unimpeached, and so the matter be brought in question again; and so it was resolved that it should not be cancelled, but remain in Court uncancelled.

And THE COURT said, that the defendant's best way would be to carry the cause down BY PROVISO; and if the plaintiff would suffer himself to be *nonsuited*, whereby the suit will be at an end, and the plaintiff entitled to take his bond out of court, yet that nonsuit would be great evidence against him in another action to be brought thereupon; [illegible]ght get his witnesses testimony perpetuated in the court of CHANCERY.

* DARNELL said, that he might bring an action upon his case against the plaintiff for suing him upon a forged bond, and that a verdict therein would be [illegible]ence for him, [illegible]tween the same parties. * [234]

And so he took nothing by his motion.

(*a*) [illegible] (*c*) [illegible]
(*b*) 5. Co. 74. Co. Lit. 231. 5. Com. Dig. "Pleader" (P. 1.).

Godolphin *against* Tudor. Case 342.

Easter Term, 3. Anne, Roll [illegible].

DEBT UPON A BOND conditioned for performance of articles. The condition recited, "THAT WHEREAS *Sir William Godolphin* was auditor of *Wales* for his life, and had deputed the defendant's testator to exercise his said office during his good behaviour, and that the defendant *pro deputatione praed.* did agree to pay him

If a person hold an *auditor's* office for life, and depute another to execute the said office during his [illegible] behaviour, a bond given by such deputy to pay his principal yearly, during the said deputation, [illegible] pounds, and that in consideration thereof the deputy shall have all the fees and profits of the said office to his own use, is void by the statute 5. & 6. *Edw.* 6. c. 16.; for it is a bond to pay a certain sum at all events. —S. C. ante, 38. S. C. 2. Salk. 468. S. C. 3. Salk. 251. Post. 237. 3. Post. 148. [illegible] Co. Lit. 234. 3. Keb. 552. 659. 678. Cro. Car. 361. Cro. Jac. 269. 386. 2. Salk. 466. 529. Comy. Rep. 2. 1. Hawk. P. C. ch. 67. s. 5. 4. Burr. 2497. 2. Ch. Cases, 42. Com. Dig. "Officer" (K. 1.).

GODOLPHIN *against* TUDOR.

him yearly, during the ſaid deputation, two hundred pounds, in conſideration whereof the defendant's teſtator ſhould have all the rents and profits of his ſaid office to his the defendant's uſe, and likewiſe ſave the plaintiff harmleſs, &c. and the bond was for performance thereof.

The defendant pleads the ſtatute of 5. & 6. *Edw.* 6. c. 16. &c. making bonds and ſecurities, &c. for certain offices void, without the neceſſary averments, &c.

The plaintiff replies, that the ſaid office had a fixed ſalary of twenty pounds a-year belonging to it, and that during the whole time of the ſaid deputation the annual, juſt, and legal profits of the ſaid office did amount to three hundred and twenty-nine pounds and ten ſhillings, and that during all the aforeſaid time the defendant did receive yearly the ſaid ſum of three hundred and twenty-nine pounds and ten ſhillings out of THE EXCHEQUER for the fees and profits of the ſaid office to his own uſe: and aſſigns breach in not paying the ſaid two hundred pounds for ſo many, &c.

The defendant rejoins the ſame matter as in the replication: and demurrer.

THE CASE being three times argued in this and the two precedent Terms,

THE COURT were clearly of opinion againſt the plaintiff; and took this diverſity, that if an office deſcribed by the ſtatute have a certain ſalary annexed to it, a deputation of ſuch office, reſerving a ſum leſs than the ſtanding ſalary, will not be within the ſtatute. So if fees be uncertain, and no certain ſalary annexed to the office, reſerving a certain ſum out of the fees will not be within the ſtatute; becauſe in that caſe, if the fees anſwer not the ſum certain, the deputy is not to pay the ſum certain, it being payable out of the profits. But here the event will not help it, it being void at firſt; for the fees being things ariſing from the buſineſs of the office, which may be more or leſs, they muſt be uncertain, and yet the defendant's teſtator, at all events, was to pay a ſum certain, let the fees be more or leſs (*a*).

So they adviſed the plaintiff to diſcontinue, which he denied.

Judgment was given for the defendant on the laſt day of the Term; and the ſaid diverſity allowed and confirmed for good law;
*[235] * for if one reſerve a ſum certain upon a deputation out of the profits or fees, he only reſerves part of that which was wholly his before; for though, by making a deputy, the whole power of the principal is in the deputy, yet the fees or profits do not paſs, and the deputy has no right to them: then if he make a deputy, reſerving, a ſum certain, part of the profits, and the reſt to deputy, he may well do it, for it is but reſerving part of what was wholly his (*b*).

(*a*) See Ellis *v.* Neſſon, 3. Keb. 717. 659.

(*b*) See the caſe of Garforth *v.* Fearon, 1. H. Bl. Rep. 327.

NOTE,

NOTE. If one put in a deputy without any allowance of salary, he has no remedy but by *quantum meruit*, and that against his principal.

Quantum meruit for a deputy having no allowance.

Davenant *against* Rafter. Case 343.

ERROR OF A JUDGMENT in the court of common pleas upon *nil dicit* in debt upon a bond, for want of an original. The defendant pleads *a release of errors.* The plaintiff replies, that there was another judgment between the parties for the same sum, and of the same Term, and that the release was of that judgment of which the writ of error was not brought, ABSQUE HOC that it was of this now in question. To which the defendant demurs.

In error on a judgment in debt, if the defendant plead a "release of errors," the plaintiff cannot reply that the release was of errors in another judgment, and traverse its application to the judgment in question.

EYRE maintains the demurrer, for by this *traverse* the defendant is excluded from saying that there is but one judgment, for it is only made an inducement to the traverse.

PER CURIAM. The question is, Whether there ought to be a traverse in this replication? for then you would cut out the plaintiff from pleading "*nul tiel record.*" But your way seems to have been, to have shewed one judgment specially, and then to have averred the release to have been of that judgment, and so have rested. As suppose a man has two manors of *Dale*, and levies a fine of his manor of *Dale*, he shall by averment ascertain of which of them it was. If debt be brought upon a sheriff's bond conditioned for an appearance in this court *die Veneris prox. post mens. Mich.* and the defendant plead a writ of *latitat* taken out against the party at the suit of the same plaintiff, returnable *die Mercurii*, and that the party was upon that writ arrested, and the bond was given for his appearance at another day than the return-day of the writ, and so the bond is void by the statute of 23. *Hen.* 6. c. 9. the plaintiff may come and say, that he took out a writ returnable *die Veneris*, and that an arrest was upon that, and the bond for appearance to it, without traversing the other writ; and if a thing, which may in process of pleading become material and traversable, be traversed before such time, it is naught, as my *Lord Hobart* * says. Now you have not shewed how this matter was material.

S. C. 2. Ld. Ray. 1046. S. C. 3. Salk. 214. Ante, 113. 206. 174. Carth. 7. 99. 2 ... 339. 1. Sid. 84. Ld. Ray. 42. 237. 359.

* [236]

* ANOTHER OBJECTION was, that the release pleaded recited a judgment in which the plaintiff recovered six hundred pounds *pro debito et damnis ultra misis et custagiis.* The errors in which the plaintiff released, and the judgment of which this writ is now brought, is *pro debito et damnis* only, without any thing of *costs*, and so a plain *variance* between the judgment released, and that now in question; for at common law, before any costs were given, the form of entering judgments in debt was *pro debito et damnis*, as this is; and therefore the judgment recited in the release, and that of which this error is now brought, are not the same.

If on error on a judgment *pro debito et damnis*, a RELEASE be pleaded reciting the judgment to be *pro debito et damnis ultra misis et custagiis*, the variance is not material.

11. Mod. 2. Ld. Ray. 1047, 1221.

But PER CURIAM, In the court of common pleas they always, in case of judgment by *nihil dicit*, enter judgment *pro debito et damnis*, without more; though in this court the manner be, *tam pro*

debito

Davenant against Rafter.

debito et damnis quàm pro misis et custagiis, and damages include costs: and besides, in the judgment recited in the release it does not say that any costs were recovered, but *ultra misis et custagiis* he recovered six hundred pounds for his debt and damages.

In what case a *certiorari ad audiendum errores* shall issue.

It was also objected, that judgment ought not to be affirmed without a *certiorari* to ascertain to the Court how the matter stood below.

Ante, 206, 207.
Raft. 300.
21. Edw. 4. 43.
1. Co. 14.

But the Court took this difference: If the defendant, upon error assigned, will not come in and plead, there the plaintiff must have a *scire facias* against him *ad audiendum errores*, and a *certiorari* to certify the want of an original, that being the error assigned; but where the defendant comes in *gratis*, and pleads *in nullo est erratum*, or other plea which is ill, it is a confession of the error.

And the judgment was, "*nil capiat per breve*," because here is error upon the record, but it is released.

In what manner a plea of "release of errors" may conclude.

Note, At another day it was objected, that the conclusion of the defendant's plea was naught; for it was, "*quod quer. &c. excludatur, et quod judicium affirmetur*," when by law the judgment is to be affirmed.

But this objection was over-ruled; for *quod quer. praecludatur* is enough, and the rest surplusage.

If issue be taken on a dilatory plea, it must conclude *petit judicium*; but if it confess and avoid, the conclusion must be in maintenance of the writ.

And here Holt, *Chief Justice*, took this diversity as to *conclusions*, that if a dilatory be pleaded, and the plaintiff take issue upon it, he may conclude with a *petit judicium et damna*, because there *final judgment* shall be; but if a dilatory be pleaded, which the plaintiff does not deny, but confesses and avoids, he must conclude in maintenance of his writ: as if a defendant plead "*attainder*" in disability of the plaintiff, and he replies "*a pardon*," he must not conclude with a *petit judicium et damna*, but in maintenance of his writ.

Instit. Leg. 272.
5 2. 523. Skinner, 387. 517. 2. Vent. 105. Salk. 601. 12. Mod. 399. 1. Peer. Wms. 258. Ld. Ray. 337. 339. 594. 853. 1018. Strange, 520.

*[237]

Case 344.

* Lady Cook *against* Remington.

In an action of debt on bond for performance of covenants, the defendant, in pleading covenants performed, must shew the indenture from the counterpart.

Debt upon a bond, with condition to perform covenants in a certain indenture mentioned. The defendant craves *oyer* of the indenture, which the plaintiff gives him; and one of the covenants therein was, that the defendant would safely give up to the plaintiff the goods, a particular whereof was written on the back of the indenture. The defendant pleads *performance* generally: to which the plaintiff demurred.

And it was held per Curiam:

Ante, 234.
S.C. 1. Salk. 498.
1 Sid 50. 97.
425.

First, That when one is bound to perform covenants in an indenture, in an action upon such bond, the defendant, in order to discharge himself, ought to shew the said deed to the Court, that

1. Keb. 104. 127. 1. Saund. 9. 22. 1. Mod. 266. 1. Vent. 37. Keilway, 71. 1. Sid. 425. Cro. .460, 1. Saund. 22. Stra. 227. 1186. 1198. 1241.

they

they may see what the covenants are; for he cannot ſhew that he has performed all, without ſhewing what he was to perform; and therefore he ought to recite the indenture, whereof he is ſuppoſed to have a counterpart, in his plea. LADY COOK *againſt* REMINGTON.

But if he never had a counterpart, or had loſt it, upon oath thereof, the Court will compel the plaintiff to give him a counterpart, in order to ſet it out for his defence.

SECONDLY, That though the plaintiff in this caſe was not compellable to give him *oyer* of the deed, yet if he will do it, it will ſuffice for the defendant to plead upon.

If plaintiff gives *oyer* of a deed not declared on, the defendant may plead on it.—5. Com. Dig. "Pleader" (P. 1.).

THIRDLY, That the indorſement here, at the time of the enſealing and delivery of the deed, was part of it; and therefore *oyer* of the body of the deed, without *oyer* of the indorſement, was not a complete *oyer* of the deed, the deed relating to the indorſement, and therefore not perfect without it; and it differs in this from an obligation with a condition indorſed, for there may be *oyer* of the obligation without any of the condition; and if one crave *oyer* of the obligation, he ſhall not upon that have *oyer* of the condition, becauſe the obligation is complete and perfect without the condition, and does not refer to it.

An indorſement on a deed, made at the time it was ſealed and delivered, is part of the deed itſelf.

S C. 1. Salk. 498. 2. Ter. Rep 641. 5. Com. Dig. "Pleader" (P. 1.).

FOURTHLY, If the indorſement were after the enſealing and delivery of the deed, and at another time, it is a new deed; and in that caſe, if a bond were to perform articles in one deed, and that deed refers him to another, there, to diſcharge himſelf, he muſt ſhew the matter in the ſecond deed that is referred to from the firſt.

An indorſement made after ſealing and delivery of a deed is a new deed.

Stra. 18. 3. P. Wms. 409.

FIFTHLY, Here where the plaintiff gave the defendant an incomplete *oyer*, viz. of the deed without the indorſement, he ought not to have reſted ſatisfied therewith, but to have ſet forth further the whole purport of the indorſement, or averred that there was none.

Defendant not bound by the deed ſet forth on *oyer* prayed.

And judgment was given for the plaintiff *niſi*, &c.

*[238]

* Wells *againſt* Oſmond.

Caſe 345.

LIBEL in the admiralty for *ſeamen's wages*. It appeared, that a builder made a contract for a ſhip with an owner; who thereupon had the ſhip put into his poſſeſſion, and contracted with ſeamen to go with him on a voyage; and in order to rig the ſhip for that voyage, the owner brought the ſeamen to work for a conſiderable time on board the ſhip; after which, through diſagreement between the builder and the owner, the voyage was put off, and the ſeamen diſmiſſed without their wages: They now libel for their wages againſt the ſhip.

If the owner of a ſhip contract with ſeamen to go the voyage, and, in order to haſten the outfit, they do work on board the ſhip while ſhe continues in harbour, and the owner afterwards diſmiſſes the ſeamen without going the voyage, they may ſue in THE ADMIRALTY for their wages, although the work was done within the body of a county.—S. C. 2. Ld. Ray. 1044. 1. Salk. 31. 33. 2. Salk. 424. Ante. 25. 3. Mod. 244. Ld. Ray. 398. 632. 576 639. 650. 730. 1206. 1211 1247. 1453. 12. Mod. 405. 408. 440. 526. Comy. Rep. 74. 137. Stra. 707. 858. 937. 968. 405.

A prohibition

WELLS *against* OSMOND.

A prohibition was moved for, upon suggestion that the work was done *in corpore com.* and no voyage ever made.

But BY THE COURT, If a contract be made with seamen to go on a voyage, and they, in order thereunto, work in a harbour, and afterwards the voyage is intercepted through the owner's fault, as if the ship be arrested for his debt, &c. the seamen shall sue in the admiralty for their wages for the work done so in harbour in pursuance of the contract to go on a voyage, as much as if they had gone the voyage; but otherwise, if the retainer of them had been only to do the work in the harbour (*a*) : and in this case the ship ought to be liable for their suit, because the builder, by trusting it into the owner's possession, gave him an opportunity of engaging of seamen, who are the easier induced because they see him in possession of it ; and they, being strangers to the builder's bargain with the owner, ought not to suffer by its not being performed ; and the builder might have taken care to secure himself from any such charge when he entrusted the owner with the possession of his ship, whereby he rendered it obnoxious to the wages of such seamen as he should bring on board her in order to go a voyage in her.

And the motion for a prohibition was denied (*b*).

The reason why seamen may sue in the admiralty. 2. Wils. 265.

And PER CURIAM, The true reason why seamen may sue for their wages in THE ADMIRALTY, though the contract be on land, is, that there the ship itself is made liable to them (*c*) ; and besides, there they may all join in the suit ; neither of which may be at common law, and yet both are much for the ease of poor seamen.

(*a*)

(*b*) See the case of Ross *v.* Walker, 2. Wils. 264. where this case is recognized as law —But a pilot who is sent for from *Gravesend*, and goes from thence on board a ship lying in *Sea Reach*, and pilots her from thence to her moorings at *Deptford*, though *a mariner*, cannot sue in the admiralty for the pilotage ; for both the contract and the work done were within the body of a county, 2. Wils. 265.

(*c*) See Howe *v.* Nappier, 4. Burr. 1945.

Case 346. Anonymous.

At what time bail may surrender the principal, though notice be not given to the plaintiff.

8. Mod. 340. 1. Ld. Ray. 157. 1. Stra. 198. 1. Wils. 270. 3. Burr. 1360.

PER CURIAM. If bail surrender the *principal* at or before the return of the second *scire facias*, it is good, though there be not immediate notice of it to the plaintiff ; for the end of notice in that case is twofold : one, that the plaintiff may, if he please, charge him in execution ; the other, that he be at no further trouble or charge in proceeding against the bail : but if, through want of notice, he is at further charge against the bail, that shall not vitiate the surrender; but yet the bail shall not be delivered until they pay such charges.

4. Burr. 2134. Tidd's Pract. 145. 150. 1. Com. Dig. "Bail" (Q.4.). 1. Bac. Abr. 217.

* And HOLT, *Chief Justice*, quoted the case of *Kemp v. Laurence (a)*, where it was held, that a tenant for years is a good tenant to plead in bar to a *scire facias* on a judgment for debt or damages; because that is only in the personalty; *secus* to a judgment in the realty. If one jointenant be returned, he may plead that another is tenant of a moiety.

ADAMS *against* TERRE-TENANTS OF SAVAGE.

And by THE COURT a *respondeas ouster* was awarded.

(a) Owen, 134.

Fitz-Hugh *against* Dennington.

Case 330.

ERROR OF A JUDGMENT in THE MARSHAL'S COURT in debt upon a bond. The defendant, upon *oyer* of the bond, which recited, that the plaintiff was become an apprentice to the defendant for seven years, and was conditioned, "that "if the defendant, at the end of the said seven years, should make, "procure, or cause, the plaintiff to be made free of THE COMPANY "OF JOINERS of *London*, if thereunto requested, then the obligation to be void," pleaded, that *ad finem* of the said seven years, or after, until time of action brought, he was not requested. To which the plaintiff demurred.

If a master give a bond to make his apprentice free of the city at the end of seven years, *if requested*, the defendant may plead, to an action of debt on this bond, "that at the end "of seven years, "or after, he "was not re-"quested, &c." for he was not bound to do it, except upon request made at the time appointed for the performance.

S. C. post. 259.
S. C. 2. Salk. 585.
S. C. 3. Salk. 309.
S. C. Holt, 68.
S. C. 2. Ld. Ray. 1094.
Ante, 223.
1. Lev. 85.

Judgment was given for the plaintiff below, supposing the request not material at all, or at least if it were that the plea should have been, "that he never was requested," and not to tie it up to a request at the end of the seven years, or after; for he might have requested before the end of the seven years to make him free at the end of the seven years.

But MONTAGUE, *for reversing the judgment*, insisted, that if in this case the request had not been expressly made part of the condition, yet the plea would not have been good: and he took a diversity, that when there is a duty made by the bond, there needs no averment of a request; but otherwise when the bond is for doing a collateral act, as here: and for this he quoted 1. *Brownl.* 13. But whenever the condition is to do a thing "when thereunto re-"quired," or "if thereunto required," there the request is part of the condition, and must be averred.

PER CURIAM. The request is material here: The meaning is plain, from the recital, that the defendant was to have made the plaintiff free at the end of seven years, that is, when his time was out, if the plaintiff pleased, which was to be signified to the defendant by request; and the request must be when the condition could be performed, *viz.* at the end of seven years, and not before; and if it were a good request within the seven years, that ought to be shewn on the plaintiff's side, otherwise it shall not be intended; for it cannot be intended that one would request a thing to be done before it was to be, or could be, done.

And the judgment was reversed *nisi (a)*.

(a) This case was moved again, and after a second argument the Judges gave their opinions *seriatim*; and the judgment was unanimously reversed. S. C. post. 259. 261.

Case 331. * Robert *against* Harnage.

A declaration in debt on bond, conditioned to pay "to *A.* his "attorney or "assigns," is maintained by evidence of a bond "to pay "to the attorney of *A.* or "his assigns."

S. C. 2. Salk. 659.
Hob. 171.
Cro. Eliz. 256.
1. Stra. 76.
2. Burr. 325.

THE PLAINTIFF declared, that the defendant became bound to him at *Fort St. David's*, in the *East Indies*, at *London*, in a bond of ———, for the payment of ———, to him, his attorney, or assigns.

Upon *oyer*, the bond appeared to bear date at *Fort St. David's*, in the *East Indies*: and the *solvendum* was to the plaintiff's attorney or assigns, without mention of himself.

And on demurrer to the declaration two exceptions were taken:

FIRST, That the bond declared on, and that set out on the *oyer*, were variant; the one being "*solvendum* to him, his attorney, or "assigns;" the other, "to his attorney or assigns."

To which it was answered, that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon: as if *A.* bind himself in a sum to *B.* *solvendum* to *C.* who is a stranger, a payment to *C.* is a payment to *B.* and in an action upon it the count must be upon a bond *solvendum* to *B.* (*a*).

And PER CURIAM, If *A.* make a bond to *B. solvendum* to such person as he shall appoint, if *B.* do appoint one, payment to him is a payment to *B.*; and if *B.* appoint none, it shall be paid to *B.* himself.

If a bond bear date at any place *abroad*, that *place* must be stated in the declaration with a *viz.* at such a place in *England.*

S.C. 2. Ld. Ray. 1043.
Ante, 194.

SECOND EXCEPTION was, that the bond set forth appeared to have been sealed and delivered at *Fort St. David's*, in *the East Indies*, and therefore the date made it local; and by consequence, the declaration ought to have been of a bond made "at *Fort St.* "*David's* in *the East Indies*, at *Islington* in the county of *Mid-* "*dlesex*," or "in such a ward or parish in *London*, &c." as upon a bond "*apud* BOURDEAUX in *France*, in *Islington*."

And of that opinion was THE COURT.

Co. Lit. 261. Latch. 4. 10. Mod. 255. 2. Ld. Ray. 1212. and see the case of Fabrigas *v.* Mostyn, Cowp. 178. 181. and Ilderton *v.* Ilderton, 2. H. Bl. Rep. 160, 161.

(*a*) Year-Book 4. *Edw.* 4. pl. 19. 2. Keb. 81. 1. Sid. 295.

Case 332. Peat's Case.

Previous to the 10. *Anne*, c. 3. a *dissenter* might be prosecuted in the county in which he resided, though qualified in another.

S. C. post. 310.

PEAT was a preacher to a meeting of dissenters; and having qualified himself as such, according to THE TOLERATION ACT (*a*), in one county, removed from thence into another county, and set up a conventicle there, without any further qualification; whereupon a justice of peace convicted him upon the *statute of Conventicles* (*b*).

S. C. 2. Salk. 572. 2. Salk. 673. 4. Com. Dig. "Justices of Peace" (B. 16.).

(*a*) 1. *Will. & Mary*, c. 18. (*b*) 22. *Car.* 2. c. 1.

THE

If at *any time, after the return of the *capias*, the *bail* surrender *the principal* at a Judge's chamber, and he thereupon is committed to THE TIPSTAFF, from whom he escapes, or is rescued, that will not be a good surrender, because it is indulgence to the bail to surrender after a *capias* returned; *secus* if it be before a *capias* returned, for to surrender before, or at the return of the *capias*, is a matter of right.

If a *principal* be committed to a tipstaff, on a surrender at a Judge's chambers, and escapes, *the bail* are liable.

And now by the rule of Court, upon the first sort of surrender the principal ought to be two days in the marshal's custody to make it a good surrender.

Tidd's P. 147.

Ride *against* Ride. Case 347.

A POPISH RECUSANT convict made his wife, and another popish recusant, his executrix. The spiritual court would suffer her to prove the will.

The wife of a popish recusant cannot be executrix to her husband.

A prohibition was moved for, upon the statute of 29. *Eliz.* c. 6. f. 22. (*a*).

PER CURIAM. It was granted, for she is disabled by the general clause, and not enabled by the *proviso*.

S. C. 3. Salk. 133. 239. 2. Salk. 552. 1. Hawk. P. C. ch. 12. f. 10. 10. Mod. 115. 357. 406. 483. 512. 536. Gilb. Eq. Rep. 237. 1. Peer. Wms. 353. 2. Peer. Wms. 3. 132. 135. 361. 3. Peer. Wms. 49. Comyns, 169. 207. 307. 570. Stra. 267. 318. 1096.

(*a*) See also 3. *Jac.* 1. c. 5. f. 10.

The Queen *against* Foxby. Case 348.

JUDGMENT upon an indictment at the quarter-sessions of *Maidstone* was reversed; the indictment being, for that she was *communis rixa*, a common scold, instead of *rixatrix*.

"*Communis rixa*" instead of *rixatrix* is error.

S. C. ante, 11. 173. 213. S. C. 1. Salk. 266. S. C. Holt, 274. S. C. Ld. Ray. 1094. 2. Keb. 687. 1. Mod. 71. 1. Salk. 382. 1. Hawk. P. C. ch. 75. f. 5.

Anonymous. Case 349.

COVENANT against husband and wife upon a deed of demise to the wife *dum sola*; whereby she covenanted, that she would every year, during the term, plant so many oak plants on the premises.

Covenant lies against husband and wife upon a demise to her *dum sola*, &c.

The breach assigned was, that *aliquos querculos aliquo anno durante termino annuatim*, they or either of them *non seruit seu plantavit*.

10. Mod. 163. 246. Stra. 229. 1094. 1272.

MONTAGUE objected, that the wife ought not to be joined in the action for a breach committed since the coverture.

Sed non allocatur: If the wife had assigned *dum sola*, the action for a breach would lie against the husband and her jointly: and as to the *annuatim aliquo anno*, at most it is but *surplusage*, and shall be rejected.

JUDGMENT was given for the plaintiff.

The

Case 350. * The Queen *against* Branworth.

An indictment will not lie at common law against *a hawker and pedlar* for being *a vagrant*.
S. C. 3. Salk. 258.
S. C. Sett. & Rem. 222.
S. C. Holt, 709.
Ld. Ray. 790. 1360.
11. Mod. 3.

INDICTMENT by a jury of the town of *Portsmouth*, "for "that he, being an idle person, did wander in the said town "selling of small wares as a *petit chapman*."

To maintain this indictment it was urged, that a *petit chapman* is a vagabond by the statute of 39. *Eliz.* c. 4.; and though some *petit chapmen*, that is, such as are legally qualified by the statute of 8. & 9. *Will.* 3. c. 25. may now lawfully use that occupation, yet that act excepts boroughs and corporations, so that as to them they remain *in statu quo* (*a*).

HOLT, *Chief Justice*. Is a vagabond, *quatenus* such, indictable? It seems not; for at common law a man might go where he would; but if he be *an idle and loose person*, you may take him up as *a vagrant* (*b*), and bind him to his good behaviour by the common law; and by the statute of Labourers (*c*) he may be compelled to serve. There is indeed a way by law of punishing *incorrigible rogues*, by burning them in the shoulder, and sending them to THE GALLIES (*d*); from whence it may be urged, that there must be a way before of convicting them of being *rogues*, because they cannot otherwise be punished as *incorrigible rogues*; and therefore that conviction must first be by indictment.

But by HOLT, *Chief Justice*, No; but by being judged by a justice of peace to be *a vagrant*, and used by him as such; and if he offend again, he may be indicted as *a common vagrant* (*e*).

Rule for quashing it was enlarged.

(*a*) See also the statute 29. *Geo.* 3. c. 26. and the case of Rex *v.* Rediferne, 4. Term Rep. 273.

(*b*) See the Vagrant Act 17. *Geo.* 2. c. 5.

(*c*)

(*d*) See Bracton, lib. 3. cap. 10. and 3. Inst. 103.

(*e*) See Baillie's Case, Cases Crown Law, 306.

Case 351. Blackmore *against* Tidderly.

Trinity Term, 3. *Anne*, *Roll* 231.

To an action of assault and battery, A PLEA of "not guilty "within *six* "*years*" is bad on a *general demurrer*; for the 21. *Jac.* 1. c. 16. limits such actions to *four years*.
S. C. 1. Salk. 423.
S. C. 11. Mod. 38. S. C. 2. Ld. Ray. 1099. Post 309. Carth. 3. 136. 144. 335. 471. Ld. Ray. 435.

TRESPASS, ASSAULT, AND BATTERY. The defendant pleaded NOT GUILTY *infra sex annos*.

The plaintiff demurred to plea, as being argumentative; for the statute 21. *Jac.* 1. c. 16. limits this action to *four years*, and not to *six years*. It is indeed an argument, that if it was not within six, it could not *à fortiori* be within four years; but pleadings ought to be direct, and not illative.

But PER CURIAM, You might well have joined issue with them upon this plea; for if they have taken a larger compass than they need, it is for your advantage. Upon this issue you might have given battery after four years, and within the six years, in evidence

and it would have maintained your issue, and you could have judgment thereupon, it being found for the plaintiff, without the help of the *statute of Jeofails*. So if the plea had been NOT GUILTY within *a week* or *a year*, and verdict for the plaintiff, he should have judgment; for *guilty* or *not guilty* is the substance. BLACKMORE *against* TIDBERLY.

But in the *Hilary Term* following THE WHOLE COURT were of a contrary opinion.

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* Anonymous.

Case 352.

BY HOLT, *Chief Justice*. If a devise be made to the heir at law, paying such and such legacies, &c. and for default thereof remainder over, the heir until default is in by *discent*, and the other's interest is by way of *executory devise*: and so it was in the case of *Pell v. Brown* (*a*) in effect, where the fee was devised to one that was not heir, the remainder to him that was heir, there the heir was in by *descent* (*b*). It is hard to maintain, either by use or devise, a remainder to a stranger, after a present fee to one who is not heir at law.

On a devise to an *heir at law*, paying, &c. and for default thereof remainder over, &c. the heir, till default, is in by *descent*.

2. Atk. 290.
2. Bl. Com. 142.

(*a*) Cro. Jac. 590. 1 Eq. Abr. 187. Bridg. 1. 3. Palm. 131. 2. Roll. Rep. 196. 216. Godb 282.

(*b*) See Sole *v.* Gerard, Cro. Eliz. 525. S. C. Noy, 64. S. C. Moor, 422.; Dindant *v.* Burchet, Skin. 205.; Lamb *v.* Archer, Skin. 340.; Haynsworth *v.* Pretty, Cro. Eliz. 833. 919. NOTE to *former edition.*—But see Gilpin's Case, Cro. Car. 161.; Brittain *v.* Charnock, 2. Mod. 286.; Emerson *v.* Inchbind, 2. Ld. Ray. 728.; Allen *v.* Heber, 2. Bl. Rep. 22. S. C. Stra. 1270.; Newton *v.* Bennett, 1. Bro. Caf. in Ch. 135. and Powel on Devises, 433. 3. Com. Dig. "Devise" (K.)

Reignots *against* Tipping.

Case 353.

BY THE COURT and all THE CLERKS. After a rule to sign judgment, there ought to be *four days*, exclusive of the day on which the rule is made and the judgment signed. The meaning of the rule is, that the party may have reasonable time to bring a writ of error, if he see occasion; but in the common pleas they never give rules for the signing of judgment, but they stay until the *quarto die post*, which makes but four days inclusive.

Time of signing judgment.
Ante, 191.
2. Salk. 518.
1. Salk. 399.
Impey's Pract. 347.

Denham *against* Stevenson.

Case 354.

DEBT by an administrator against the heir upon a bond of his ancestor; and declares *cui administratio omn. bonor. &c.* by such a peculiar *debito modo commissa fuit*; without saying, that he had ordinary jurisdiction, or that it did of right belong to him to commit administration: and demurrer to the declaration.

In debt by an administrator upon a bond against an heir, he need not shew how the defendant is heir.

FIRST, It was excepted, that he had not shewn how the defendant was heir; and for the necessity of so doing was quoted the case of *Carver v. Haselrig* (*d*).

S. C. 1. Salk. 355.
S. C. Holt. 45.
Ld. Ray. 562. 356.

But PER CURIAM, The diversity is, that where he sues as heir, there, because he is presumed conusant of his *pedigree*, he ought to

(*a*) Hob. 251.

DENHAM *against* STEVENSON.

An administrator, in debt on bond against an heir, may declare generally that administration was *debito modo* committed to him by such *a peculiar*, without shewing *the right* of the peculiar.

shew it; but not where he is sued (*a*), because strangers shall not be compelled to shew what lies not in their knowledge.

SECOND EXCEPTION. He makes title by virtue of administration committed by *a peculiar*, without alledging any right in the peculiar to commit administration, and that is substance and traversable; for *de communi jure* here in *England*, it belongs to THE ORDINARY (*b*).

It was urged, on the other side, that at most it was but matter of form, the omission whereof is not to be objected upon a *general demurrer*; and upon issue the plaintiff would not be put to prove that the peculiar had right to grant administration.

* [242]

S. C. 1. Salk. 40. 1. Lev. 71. 5. Mod. 425. Vide 1. Lutw. 8. 297, 298. 2. Mod. 65. 1. Sid. 90. 3. Lev. 211. 5. Mod. 425. 1. Sid. 228. 1. Lutw. 8. 297. 2. Mod 65. Cro. Eliz. 431. 791. 838. 879. 907. 1. Sal. 40, 41. Carth. 148. Ante, 134.

* HOLT, *Chief Justice*. It cannot be said to be only form; for it is the committing of administration by one having legal authority which vests the cause of action in the plaintiff, and by law *the ordinary* is to commit administration. In all cases of *peculiars*, you must shew title and right to grant administration; and the least averment that can do it, is to say, that *de jure* it did belong to him to grant administration; for the Court cannot take notice of peculiars, but may of bishops; and *profert in Cur. literas administrat.* is not enough (*c*); for they only certify what is on the face of them, *viz.* that administration was committed to the plaintiff by such a one; but that does not import he had any right to grant it.

POWELL, *Justice*. Might not the defendant have come and traversed his having right to commit, if you had alledged it? In the case of *Chiverton v. Trudgeon* (*d*) it was doubted, whether the right of an archdeacon, who is taken notice of by us as *oculus episcopi*, ought not to be shewn. But all the matter is, Whether, as it is here said *debito modo commiss. fuit*, that shall be taken only in respect to the legal form of the instrument, or to the peculiar's right of committing administration? And I rather believe the first, for *debito modo* seems to me not to be enough to traverse; they might indeed have traversed the administration committed, and given in evidence that he had no right to commit administration.

And no rule was given (*e*).

(*a*) See Roe on the demise of Thorne *v.* Lad and Others, 2. Bl. Rep. 1099.

(*b*) See 1. Sid. 228. 2. Vent. 84. Cro. Jac. 556. and the case of Gidley *v.* Williams, in the king's bench, 12. *Will.* 3. NOTE *to former edition.*

(*c*) See 4. *Anne*, c. 16.

(*d*) Cro. Jac. 556.

(*e*) This case was argued a second time, and judgment given for the plaintiff; by HOLT, *Chief Justice*, GOULD and POWYS, *Justices*, that the declaration was good, and that the *debito modo* was a sufficient averment, POWELL, *Justice*, being of a contrary opinion, S. C. 1. Salk. 40.—A writ of error was afterwards brought in the exchequer-chamber, where the judgment of the court of king's bench was affirmed by the whole Court, S. C. 1. Salk. 41.

Bignall

Bignall *against* Devnish. Case 355.

PER CURIAM. If the defendant, upon *habeas corpus*, remove a cause from an inferior court, in which there ought to have been special bail below, he shall not thereby put the plaintiff in a worse condition, but be compelled to give in bail above; but as to the sum which the bail are to justify themselves worth, that may be moderated as the Court sees occasion (*a*).

The same bail shall be given on removal by *habeas corpus* as was given in the inferior court.

1. Salk. 104. 2. Show. 421. 485. 1. Com. Dig. "Bail" (I). 1. Bac. Abr. 211. Ld. Ray. 603. 696.

(*a*) See 12. *Geo* 1. c. 29.; the 19. *Geo*. 3. c. 70. Tidd's Pract. 179.

Anonymous. Case 356.

PER CURIAM. It is good cause of *new trial* where the Judge who tried the cause has denied to admit that for evidence which was legal evidence, or where he misdirects the jury.

Misdirection of the Judge, or refusal to admit good evidence, are grounds for *new trial*. Ante, 22. 222.—Faresl. 53. 64. 3. Salk. 649. Post. 307. 5. Com. Dig. "Pleader" (R. 17.).

Middleton *against* Haw. Case 357.

Hilary Term, 3. *Anne*, *Roll* .

SCIRE FACIAS upon a judgment in an action on the case, and pleaded execution by *fieri facias* by judgment *pro debito et damnis*, which is different.

Variance.

Judgment for the plaintiff.

* [243]

* The Queen *against* Rawlins. Case 358.

Hilary Term, 3. *Anne*, *Roll* .

RAWLINS was bound by a recognizance to appear the first day of Term; at which time THE ATTORNEY GENERAL filed *an information* against him.

He prayed an imparlance.

THE ATTORNEY GENERAL would have the imparlance to *crastino Animarum*: for heretofore, when one came in upon a recognizance, or *habeas corpus*, they were put to plead *instanter* (*a*). Indeed, in *the Bishop's Case* (*b*), by great advice, they pleaded, that they ought to have time to imparl, but it was ruled that they should plead *instanter*. But that was thought hard, and is now redressed; but it was never intended to grant greater indulgence on the crown side than is granted on the plea side; where the course is, that if a declaration be delivered before *crastino Animarum*, or *mensem Paschæ*, the defendant shall not give a plea so as to try it that Term, but he must plead so as to enter.

If a person be bound to appear in the king's bench on the first day of a Term, to answer all matters alledged against him, and the attorney general file an information against him on the same day, he shall have an imparlance until the ensuing Term.

S. C. 1. Salk. 367. S. C. 3. Salk. 185. 1. Lilly, 389.

HOLT, *Chief Justice*. If in a *Michaelmas Term* a *writ of summons* issue upon *an information*, and the defendant comes in

(*a*)

(*b*) 3. Mod. 212. 4. St. Tr. 300.

 voluntarily

THE QUEEN *against* RAWLINS.

voluntarily thereupon, there is reason that he should have *an imparlance*; but yet not to another Term, because, in that case, by due process continued, he might be brought in upon *an attachment* the same Term, so as to be compellable to plead *instanter*; and where, upon standing the length of process, they must have pleaded the same Term, there is reason that, upon a voluntary appearance, they should have so much time allowed to plead as they might have gained by running out the length of process, and no more; but the information is now of this Term, and until information exhibited there cannot be *a summons*; the offence being in *Middlesex*, the summons indeed may be made returnable at any day certain. On the crown side the course is, whenever *an imparlance* has been that it was granted to another Term. An *imparlance* in these cases cannot be without leave of the Court; and the reason of an imparlance is, that the defendant may have a reasonable time to advise what to plead, and the Court are judges of that time. Heretofore there have been imparlances from one return of *Michaelmas Term* to another of that Term; but on the plea-side, we have now imparlances to a day certain in the same Term (*a*).

Yet, though THE COURT declared this very reasonable, no rule was made.

(*a*) Of imparlance in appeals, &c. see 2. Hawk. chap 23. sect. 102. And note, where a cause is by original, it is said an imparlance is *ex gratiâ Curiæ*. See Skinner, 2. NOTE *to the former edition*.

*[244]

Case 359.

* Arnote *against* Breame.

Easter Term, 3. *Anne*, *Roll* .

In debt on bond for performance of an award, it is not necessary to state *the date of the award*; for if it be alledged to have been made on a day which is within the time of the submission, it is sufficient.

S. C. 1. Salk. 76. 498. S. C. Holt, 212. S. C. 2. Ld. Ray. 1075. Ante, 231. 2. Salk. 425. 1. Lutw. 382, 386. Post. 311.

DEBT UPON BOND for the performance of an award, reciting several differences between the plaintiff and the defendant, concerning a piece of ground south of the plaintiff's house, adjoining to the *River Thames*, and used as A WHARF, and the erecting several piles of boards and scaffolds thereupon to the nuisance of the plaintiff's house; all within the liberties of *St. Bride's Hospital*, *London*. "No award" pleaded; and an award set forth, adjudging, that the defendant should enjoy the said piece of ground as A WHARF, and that the said scaffolds should be pulled down and removed.

On demurrer several exceptions were taken to this award.

It is not necessary to state the date of award.

Kyd. 196.

FIRST, It does not appear what the date of it was; so it may be, that it was made without authority, as before the submission.

Sed non allocatur: for it is alledged to have been made on such a day, which appears to be within the time; and if no date be set out, it shall be intended it had none, and then it is good from the delivery,

delivery, according to *Clayton's Case* (*a*). Every writing or deed has a date in law, *viz.* the time of the delivery thereof; a deed may bear date on one day, and be delivered on another; and the day of delivery is the date, and the other the bearing date; and the making an award or deed is that which gives it the essence and being of a deed or award, and that is the date of it.

ARNOTT *against* BREAME.

SECONDLY, It was objected, that the submission was of ground, &c. within the liberty of the *Hospital of Bridewell*, and of scaffolds, &c. newly erected; and the piece of ground which is mentioned in the award is not averred to be within that *liberty*, nor to have been newly erected.

SED PER CURIAM, The award is said to be *de et super præmiss.* and therefore it shall be intended within the submission, if the contrary be not shewn on the other side, which the defendant cannot now do after "*no award*" generally pleaded, for that would be a departure.

On a submission respecting scaffolds newly-erected within such a liberty, an award made *de et super præmissis*, is good, although it do not aver the scaffolds to be within *the liberty*, or to have been newly erected —1. Salk. 70. Ante, 232.

THIRDLY, It is not awarded who shall pull down the scaffold, therefore the award is not final or certain, and so far void; and this not to be helped by any averment or intendment of the Court (*b*). The diversity is, that when a thing uncertain may in the nature of the thing be made good by averment or intendment, and when not; as if one covenant to give a bond or obligation for the enjoyment of land, there it must be to the value of the land; or if for payment of such a sum, it shall be in double the sum (*c*): but in an award it is not so, for to admit of averment is to admit the matter not determined, since the averment would be traversable, and to intend would be to make, not to expound an award. And it is not an answer to say, that it appears on the face of the award that the land was the defendant's, and therefore the nuisance being thereupon ought to be removed by him who may come there without being a trespasser; for * it does not necessarily appear that the ground was his; for the award is only, that he shall use it as A WHARF, which rather shews, that it was disputed whether it was his right before. Neither does it shew it to be his now; for the words only are, "that he shall use it as A WHARF;" that is, that he shall have the liberty of wharfage there; and if it be admitted to be his ground before (for if it were the ground of the plaintiff the erection of the boards could not be a nuisance to his house), yet a nuisance is by law abateable by him to whom it is a nuisance; and if it were not, the arbitrators might, by ordering the plaintiff to pull it down, enable him to do it without danger of becoming a trespasser thereby. So it being left indefinite, whether the plaintiff or the defendant shall pull it down, it is therefore void for uncertainty; and then this being assigned only for breach, though the award for other particulars were good, the plaintiff cannot recover, there appearing no cause of action on the whole record for him, according to *Turner's Case* (*d*).

If *A.* erect scaffolds on his own ground, and thereby commit a *nuisance* to *B.* and arbitrators award that the scaffolds shall be removed, the award is sufficiently certain, though it do not say *by whom*; for it shall be intended by *A.* on whose ground they are erected.

* [245]

2. Vent. 242. 1. Salk. 76. 2. Ld. Ray. 1076. Kyd, 134. 1. Bac. Abr. 143, 144. Post. 314. 9. Co. 54. 59.

(*a*) 5. Co. 70.
(*b*) Stiles, 365. 1 Roll. Abr. 164. 5. Co. 78. Cro. Eliz. 432. Moor, 39
(*c*) Cro. Jac. 116.
(*d*) 8. Co. 132.

Arnote *against* Bream.

Holt, *Chief Justice*, seemed to be of this opinion.

But Powell, Powys, and Gould, *Justices*, clearly *contra*: for when they declare it to be a nuisance, and that it should be removed, who should remove it but he on whose ground it is? And though in point of law any person may remove what is to his nuisance, yet in the case of an award, which is by judges of equity as well as law, it must be intended that it was to be done by the party on whose ground it was.

Judgment for the plaintiff.

Holt, *Chief Justice*, *dubitante ut supra*.

Case 360. Anonymous.

An action lies for certifying a wrong record.

3. Mod. 226.

PER CURIAM. Upon a writ of error, if the clerk below will certify the record wrong, an action on the case will lie against him for it; and if he make no return, the plaintiff may have a writ of *executione judicii* out of chancery.

Case 361. The Queen *against* Sir Jacob Banks, Knt.

If an indictment be removed by the prosecutor into the king's bench by *certiorari* out of *London* or *Middlesex*, the defendant must enter into a recognizance to try it the same Term, or at the Sittings after; but if removed out of any other county he is without day, and if he do not appear process shall issue till he be outlawed; but if the defendant remove an indictment, he must enter into a recognizance pursuant to 5. *Will. & Mary*, c. 2.

AN INDICTMENT was found against him at the quarter-sessions of *Berkshire*, for an assault upon *Mr. Culpeper*, in *Windsor Castle*.

The indictment was removed up by *certiorari* at the suit of the prosecutor. Both he and the defendant took out processes, made up records, and took warrants of *nisi prius* to try it at the next *assizes* after removal. The prosecutor not thinking fit to carry it on, the defendant put in his record, and was tried and acquitted.

And now a *new trial* was moved for by the prosecutor; for that when an indictment is originally preferred here above, or found below, and removed up here by the prosecutor, the defendant cannot carry it down to trial until after a default in the prosecutor, nor even then without application to the Court, and leave had. It is so in the case of an information *qui tam*, because, as the Book says (*a*), it *quodammodo* concerns the queen; *à fortiori* then will it be in the case of an indictment, which altogether concerns her.

* [246]

S. C. 2. Ld. Ray. 1082.

S. C. 1. Salk. 652.

S. C. 11 Mod. 33.

3, Salk. 380.

* To which it was answered, that there is a great difference between *an indictment* and *an information*; for *an indictment*, being a charge by the oaths of twelve men, is much heavier; and a person ought to be allowed all imaginable speed to clear himself of it, and not be continued under such an imputation until the prosecutor thinks fit to bring it to a trial; but *an information* is a bare suggestion, and therefore is more easily rested under.

(*a*) Vide 2. Leon. 110.

Another

ANOTHER OBJECTION was made, that such a course, if tolerated, would be of great mischief, for then the most profligate offenders would get themselves acquitted by surprize, or over-hastening the trial, without allowing the queen convenient time to manage her prosecution.

In *indictments* and *informations*, neither the prosecutor nor the defendant can pray *a tales* without a warrant from THE ATTORNEY GENERAL.

It was answered, that there could be none, because, in crown causes, there cannot be *nisi prius* or *tales*, without a warrant from THE ATTORNEY GENERAL, who will be sure to grant none if he find any such danger; and that such a thing may be at least by consent appears by the case of *The King v. Jones (a)*, and the granting a *nisi prius* amounts to a consent.

Savil, 2.
1. Lev. 223.
Bull. N. P. 305.

PER CURIAM. Before the late statute of 5. & 6. *Will. & Mary*, c. 2. concerning removals by *certiorari*, if the defendant had removed an indictment from any county except *London* and *Middlesex*, he was *sine die* out of court, and only to be brought in upon *process*, whereupon he might have been *outlawed*; but in that case the defendant might have come in voluntarily if he pleased: but if the indictment had been removed from *London* or *Middlesex* by the defendant, there he must have entered into *a recognizance* to carry it down to trial the same Term, or the sitting after (*b*); and in imitation of this practice in these two counties the late act was made, whereby the defendant, upon *certiorari* brought by him to remove an indictment out of any county in *England*, must enter into a recognizance to carry it down and try it at the next assizes, because of the great delay of justice occasioned by the other course; but if the prosecutor do remove it up, the defendant upon pleading does not enter into a recognizance to try it, and that begets the question, Whether, notwithstanding, he may immediately carry it down to trial?

1. Salk 380.
2 Hawk. P. C. ch. 27. s. 26. s. 47.
1. Burr. 11. 54.
3. Burr. 1462.
1. Bac Abr. 353. 682.

And it was allowed here, that this being removed up by the prosecutor before plea, the defendant was out of court, and *sine die*, and might be brought in by *process* (*c*), or sued to an *outlawry*, or if he pleased might come in voluntarily; and that if an indictment be found here, the defendant upon pleading shall give security to try it.

ET PER TOTAM CURIAM, after great consideration, it was resolved:

FIRST, That in civil actions the defendant cannot carry down a cause to trial by proviso until after default in the plaintiff (*d*), except in special cases where the defendant is in some respect in the nature of a plaintiff; as in *quare impedit*, in *replevin*, and in *prohibition*, to have a writ to the bishop, return, or consultation.

(*a*) 1. Keb. 195.
(*b*) 2. Hawk. P. C. ch. 27, s. 26,
(*c*) Staund. P. C. 70. 1. Salk. 61. 2. Hawk. P. C. ch. 27. s. 88.
(*d*) 2. Lev 5. Dyer, 215. 2. Hawk. P. C. ch. 41. s. 10.

*No trial by *proviso* in the king's case. SECONDLY, * There cannot be A TRIAL *by proviso* in the king's case, because there can be no laches in the king.

May by consent of prosecutor. THIRDLY, A defendant may at the first instant, by consent of the prosecutor, carry his cause to trial, where THE QUEEN is party.

Where trial must be at bar, &c. 2. Hawk. P. C. ch. 42. FOURTHLY, That all causes of the queen in this court must be tried at THE BAR, if MR. ATTORNEY will not grant a warrant of *nisi prius*.

A *nisi prius* is a consent. FIFTHLY, That that warrant in its nature is no more than a consent that the cause may be tried in the country, but not that the defendant shall carry it down irregularly, or contrary to the usual course.

Nisi prius superseded, if granted by surprize. SIXTHLY, That if MR. ATTORNEY grant a *nisi prius* by surprize, and after shew that to the Court, they will supersede it.

A defendant in criminal proceedings, in order to hasten trial, must apply to the Court. SEVENTHLY, which was the main point in this case, that in all indictments or informations here, or indictments removed hither by the prosecutor for treason, felony, or any inferior offence, the defendant has no other way to hasten on his trial but by application to the Court; who, upon hearing the reasons of MR. ATTORNEY, will, as they see occasion, either give him further time, or fix him a day peremptorily for the trial, or give the defendant leave to bring it on himself.

And PER TOTAM CURIAM, A new trial was granted.

A defendant cannot carry a record down to trial without leave of the Court.—Carth. 499. 507. And THE COURT directed it for a rule hereafter, that a defendant shall never carry an indictment, removed hither by the prosecutor, to trial without leave of the Court.

Case 362.

French's Case.

Bail may detain their *principal* in *the Compter* in order to surrender him to the proper prison in discharge of their recognizance, even though he be charged with a debt to THE CROWN, and the attorney general opposes the *habeas corpus*. S. C. 1. Salk. 353. FRENCH had been arrested at the suit of several persons, and had given in bail. The bail having charged him with an action of four thousand pounds had him taken up in *the City*, and committed to THE POULTRY COMPTER, in order to remove him by *habeas corpus*, and render in discharge of themselves to the prison of the king's bench, where the original actions were brought. It being *circuit-time*, and all the Judges out of town, before the bail could render him he was charged with the queen's debt. The bail having now brought a *habeas corpus* to remove him up, and render him,

THE ATTORNEY GENERAL opposed it, because THE QUEEN, as he alledged, might choose her prison, and THE COMPTER was safer than the marshal's prison; and he quoted the case of *Village v. Clayton* as a precedent for him.

Ante, 231. 1. Cro. 389. 2. Hale, 127. 1. Com. Dig. "Bail" (A.). 2. Hawk. P. C. ch. 15. f. 3. Ld. Ray. 603. Stra. 641. 1217.

But

But PER CURIAM, If he had been taken up by THE QUEEN first, there might be some reason that they should not for their own ease lessen the queen's security of her prisoner, and that the queen's interest, concurring with that of the subject, should be preferred; but on the other hand, the bail having taken him up here, THE QUEEN taking advantage thereof in charging him with her debt, ought not to prejudice them. FRENCH'S CASE.

And he was turned over. * [248]

* Stillingfleet *against* Sir Harry Parker. Case 363.

AT A TRIAL AT BAR in ejectment the question was upon the time of the commencement of a lease, which was to commence upon the determination of a lease, then in being, to *Queen Elizabeth*.

To prove a lease made to THE CROWN, a copy of the inrollment of it must be produced. Ante, 225. 1. Salk. 285. 286, 287. 2. Salk. 690. Faresl. 129. Ld. Ray. 730. 1292. Stra. 162.

To prove such a lease to the queen, an *antient book*, in which were entries of leases of the premises ever since *Henry the Seventh's* time, and which was found among the evidences of the bishops (this being bishop's land) was offered in evidence.

It was opposed, because it is not such good evidence as they might have had, for this being a lease made to *the queen* must have been inrolled, and so they might have brought a copy of the inrollment.

It was answered, that to prove the lease a good lease it would be necessary to produce a copy of the inrollment (*a*), because, without inrollment, *the queen* could not take; but that to prove a lease in fact this ancient book is good evidence, and that was what it was offered for.

Yet BY THE COURT, Inrollment is better evidence of a lease in fact than the book; and therefore it must be produced (*b*).

(*a*) By the statute 10. *Anne*, c. 18. " Where in any pleading any such indenture of bargain and sale as is required " to be inrolled by the 27. *Hen*. 8. c. 16. " shall be pleaded with a *profert*, the " persons so pleading may produce, to answer such *profert*, as well against THE " CROWN as against any other person, a " copy of the inrollment of such bargain " and sale; and such copy, examined " with the inrollment, and signed by the " proper officer having the custody of such " inrollment, and proved on oath to be " a true copy so examined and signed, " shall be of the same force and effect as " the said indenture of bargain and sale " were and should be of, if the same " were in such case produced and shewn.

(*b*) See the case Vickery *v.* Farthing, Cro. Eliz. 411. S. C. Moor, 452. Langham *v.* Laurance, Hardres, 180. Thurle *v.* Maddison, Stiles, 462. Eden *v.* Chalkhill, 1. Keb. 117. Holcroft *v.* Smith, 2. Freem. 259. Kirby *v.* Gibbes, 2. Keb. 294.

Anonymous. Case 364.

PER CURIAM. The queen cannot be tenant at will.

The queen cannot be tenant at will.

4. Com. Dig " Estates" (H. 2.).

Case 365. Burkmire *against* Darnell.

Easter Term, 3. *Anne*, *Roll* 64.

If *A.* is about to hire a horse from *B.* and *C.* (in order to encourage *B.* to lend the horse) say to him, "*Let A. have the horse, and I undertake that he shall re-deliver it to you safely*," this is a *collateral promise* within 29. *Car.* 2. c. 3. and *void*, it not being in *writing*.

S. C. 1. Salk. 27.
S. C. 3. Salk 15.
S. C. Holt, 606.
1. Salk. 280.
Skin. 326.
1. Bac. Abr. 75, 76.
2. Ld. Ray.
12. Mod. 250.

AN ACTION ON THE CASE. The declaration stated, that in consideration that the plaintiff, at the request of the defendant, would let a certain gelding of his out to hire to *J. S.* the defendant undertook that the said *J. S.* would re-deliver it to the plaintiff; that he accordingly did let him out his gelding; but that *J. S.* never re-delivered him.

At the trial it appeared upon evidence, that *J. S.* came to the plaintiff to hire a horse from him; that the plaintiff, mistrusting, was unwilling to let him have his horse; and that thereupon the defendant came and desired him to let him have it, and said that he would undertake that *J. S.* should re-deliver him safe.

THE CHIEF JUSTICE, doubting whether this promise was not void by the *statute of Frauds (a) and Perjury*, it being not reduced into writing, directed a verdict for the plaintiff, but saved them the matter to be taken advantage of above.

DARNELL, *Serjeant*, now argued, that it was void by the statute 29. *Car.* 2. c. 3. If the words had been, "*Let him have the horse, and if he do not re-deliver him I will*," that had been plainly within the statute, for it is answering against the default of another; and the undertaking here is the same in substance, for it is, that he shall do that which by law he was bound to do, and that is answering for the default of another. Indeed, if the whole credit and reliance had been upon the defendant's account, so as the plaintiff could have no remedy against *J. S.* for the non-delivery, it had

[249] been otherwise. And * he quoted a case in the second year of the late king and queen, where it was resolved upon this difference, that where the plaintiff has an action against the party for whom the undertaking is, no action will lie against the undertaker, without the promise be in writing; but not where no action lies against the party, for then the whole credit is entirely upon account of the undertaker, and the other is looked upon as his servant, and the sale and contract, in judgment of law, are to the undertaker, though the delivery be to the other party as his servant: as if *A.* come to *B.* and tell him, "*Hire your horse to J. S. and I will see you paid the hire*," there the hiring is to *A.* and not *J. S.* who is considered as a servant to *A.*

RAYMOND *contra*. I agree the difference taken by MR. SERJEANT, but will make a quite contrary inference from it; so the point between us must depend upon the fact of the agreement, and yet I would distinguish upon the said diversity. It is said, that where an action lies against the party, it will not lie upon a *parol promise* against the undertaker; and that is true, where an action lies against him upon the original contract or agreement;

(*a*) 29. *Car.* 2. c 3.

but

but where an action lies against him upon a matter collateral to the contract, I deny the rule. The words of the statute shew, that the undertaking made void is an undertaking for the party's performing the original contract: and here, upon the original contract, no action would lie against *J. S.* for not delivering back the horse; though indeed if he refuse to do it upon request *detinue* or *trover* will lie against him, not upon *the contract*, but upon the subsequent *tort* of keeping that from us which of right we ought to have, and which belongs to us. BURKMIRE *against* DARNELL.

CURIA. Clearly the words "default of another," in the statute 29. *Car.* 2. c. 3. is the default of another in performing his contract; and if the whole credit be not entirely given to the undertaker, so as no remedy lies against the party upon the contract, but that the undertaker comes in aid of the credit given by the contract to the party, the undertaking will be within the statute. The Court also agreed the case put by DARNELL, *Serjeant*; and further said, that if two persons go to a draper, and one of them says, "*Let this* "*person have so much cloth, and I'll see you paid,*" there the sale is to the undertaker only, though the delivery be to another by his appointment; but if the contract be made with *A.* and the vendor scruple to let the goods go without money, and *B.* come to him and desire him to let *A.* have the goods, and undertake that *A.* shall pay him, that will be a promise within the statute. So the whole question will be, Whether the plaintiff had any remedy upon the contract against *J. S.*

And DARNELL, *Serjeant*, insisted on it, that there is a remedy upon the bailment against *J. S.* by contract in law.

* But by HOLT, *Chief Justice*, and POWELL, *Justice*, There is no such thing as *a contract* or *promise in law*, though there be such expression in some books. * [250]

At another day THEY DECLARED, that, upon a conference with the other Judges, they had had great debate, and variety of opinions on this case, and that many thought it out of the statute; for this reason, that the horse was let out wholly upon the credit of the defendant that it should be re-delivered. But WE (says he) of this court ARE UNANIMOUSLY AGREED, that it is within the statute; for it is an undertaking for the act, and to make good the default of another. It has been objected, that, if the party did not re-deliver him, the plaintiff had no remedy against him upon the *contract*, except only in *trover* and *conversion* upon the subsequent *tort* in case of demand and refusal, and that therefore they did not think him within the meaning of the statute, because it is a remedy accruing from a wrong after the contract; but there is a way to charge him upon the original delivery or bailment, for the bailment is such as in its nature required a re-delivery, and if the bailee will not re-deliver the thing bailed, the proper and only adequate remedy is an action of *detinue* against the bailee. Therefore this promise of the defendant's, that *J. S.* should re-deliver the horse bailed,

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bailed, for which there lies a remedy against the said *J. S.* upon the bailment is *a collateral promise*, and therefore a promise to answer for the act and default of another, and by consequence within the statute. So if two come to a shop, and one of them contract for goods, and the seller do not care for trusting him, whereupon the other says, "*Let him have them, and I will undertake he shall pay you*," that is an undertaking for the act and default of another, and within the statute. But if the promise be, "*I will see you paid*," or "*I will be your paymaster*," it is otherwise.

And, by THE WHOLE COURT, the verdict was set aside (*a*).

(*a*) See Jones *v.* Cooper, where a parol promise made *before delivery* of the goods, "I will pay you if he do not," is held a collateral promise within 29. *Car.* 2. c. 3. Cowp. 227.

Case 366. **Davy *against* Salter.**

If a writ of enquiry be returnable Tres Trinitatis, which is on a Sunday, and is returned to have been executed on the succeeding day, Monday, the judgment founded thereon is erroneous: and the Court will take notice of this defect judicially, although there be no writ of error, or although it be not assigned for error on the record; for the Judges are bound to take notice of the commencement and return days of all the Terms.

ERROR from the court of common pleas on a judgment by default there.

The error insisted on was, that the *writ of enquiry* was executed after it was returnable.

The writ was returnable "*in Tres Sept. Trin.*" which is *a Sunday* of necessity, and was in that year on the *thirteenth June*, and it was returned to have been executed on the *fourteenth* of *June*, which is the day after, when the sheriff's authority by the writ was determined.

The Court must take judicial notice of the commencements and return-days of all Terms, as well fixed as moveable, and this they cannot do without likewise taking notice of the days of the month on which these days fall. You must take notice of the commencement of *Easter Term*, which must be by taking notice of *Easter-Day*, on which it depends. * *Easter-Day* is the first *Sunday* after the full moon next after the twenty-first of *March*; and if that full moon happen on *a Sunday*, *Easter* shall not be until the *Sunday* after. By the same reason you will take notice of *Trinity Term*, its beginning and returns, and that *Tres Sept. Trinitatis* must be on *Sunday*, and what day of the month that *Sunday* is, and you will find it on the *thirteenth* of *June* this year, of which this judgment is: and *Gage's Case*, as in *Co. Ent.* 252. *Mod.* 402. 1. *Roll.* 595. were quoted, and strongly relied on.

*[251]

S. C. 2. Salk. 626.
S. C. 3. Salk. 346. Ante, 148. 159. 196. Cro. Car. 53. 1. Roll. Abr. 29. 2. Jones, 228. 6. Com. Dig. "Retorn" (C. 1.). Sellon's Practice, 13. 1. H. Bl. Rep. 628. 1. Danv. 683. 2. Danv. 254. Farest. 17. Ld. Ray. 4. 281. 870. 1142. 1557.

EYRE *contra.* The Court cannot take notice of the day of the month. It is held (*a*), that the Court shall not take notice even of

(*a*) 1. Cro. 275. Jones, 300. 1. Roll. Abr. 595. Yelv 140.

fixed

fixed feasts. He urged, that *Tres Trin.* in law is not a day of return, or at least that *the Sunday* being not a *dies juridicus* should not be reckoned, and it then would be well, for a writ may be executed on the day of its return; and for this reason *the essoins* are kept on the *Monday*: and the reason seems to be, that when *Sunday* is no legal day, the *Monday* shall succeed in its place; and in the common pleas they always take the *Monday* to be *in mensem Paschæ.* If *the mise* be joined on the *mere right*, where the appearance must be on the first day, it must be, that the *Monday* is the first day, or else the party could not save himself. This seems consonant to reason, and the first institution of the thing; for it would be absurd to appoint a day for appearance which the party could not possibly appear at, and *Sunday* never was a juridical day (*a*). This is the more reasonable, because the first return is *Crast. Trin.*; and in *Cro Jac.* (*b*), the *Monday* is said to be the day of *Tres Trinitatis*; and the same in *Cro. Car.* (*c*), *viz.* that the *dies Lunæ* is the day of *Tres Trinitatis*; and all returns of writs adjourned to that day. It is objected, that the *Sunday* is always reckoned in the computation of the *quarto die post*; and the *first* and *fourth* day are taken in inclusive. But I answer, that all *the octaves* and *quindenas* are not inclusive of the first and *eighth*, or fifteenth; as in *Easter Term, quindena Paschæ* does not take in *Easter-Day*, but is exclusive of it; and so is *octabis Trinitatis* of *Trinity Sunday*, as is apparent from *the entries*, which are, "*à die* "*Paschæ in quind. dies*," "*à die Trin. in oct. dies*;" and "*à*" is always exclusive of the *terminus à quo*; and it is very odd to include the day of return in one of the four days of the *quarto die post*; for *post* is likewise exclusive (*d*). Then all judgments must refer to the first day of Term; and if so, this judgment must relate to *a Sunday*, except it be agreed that *Monday* shall succeed in its place. If a *scire facias* be returnable in the common pleas *Tres Trinitatis*, the entry is, *et modo ad hunc diem* SCILICET *diem Lunæ*; for if it be understood *Sunday*, it will be void.

DAVY *against* SALTER.

Carthew, 504.

HOLT, *Chief Justice.* If the *Sunday* happen to be the *quarto die post*, it must of necessity go to the *Monday*, because it cannot be kept on the *Sunday*; and so of *essoins*; but all *quindenas* and *octaves* are inclusive of the *first* and *eighth*, or *fifteenth* day: so *octab. Hillarii* is the twentieth * of *January*, and *Hilary Day* is the *thirteenth*; and here, where we proceed *de die in diem*, we never enter "*à die S. Trin. in octo*," or "*quind. dies*," but "*die Lunæ, &c. post festum.*" As to the relation of judgments, that is for necessity to the first juridical day, which is *Monday*, *Sunday* being none. THE CALENDAR is settled by law, and is part of the law (*e*), and the moveable Feasts by THE CALENDAR, though not altogether according to the rule in it. If a writ be returnable *quind. Paschæ*, we must surely take notice of it (*f*), and so must all those whom it concerns. Suppose upon forfeiture of

* [252]

(*a*) Britton, c. 5.
(*b*) Cro. Jac. 16.
(*c*) Cro. Car. 11.
(*d*) See Makepeace *v.* Dillon, Fort. 363
(*e*) Cro. Eliz. 227. 1. Leon. 328.
(*f*) See ante, 41. 86. 160 196.

issues,

DAVY *against* SALTER.

2. Inst. 135. a. Ante, 148. 159. and 196. Ld. Ray. 353. 281. 480. 1557.

issues, or saving, or keeping of days in a real action; and *Gage's Case* (*a*), and that of *Fish v. Brockett* (*b*), are unanswerable: the *Monday* is not the *Tres Trinitatis*, but *the Sunday* is it, though in cases of necessity it be kept on *the Monday*. Some years ago *Midsummer-Day* happened to be on *a Wednesday*, which should have been the last day of the Term; but being a *dies non*, upon great consideration the day following was kept. By the statute of 22. *Hen.* 8. c. 21. *Trinity Term* is to begin the morrow after *Corpus Christi Day*, and therefore we do not come here the fourth day. And he quoted a trial at *nisi prius*, which was set aside, because it was *die Lunæ in mensem Paschæ*. And though "*à*" be generally exclusive, and the entry in the common pleas in all cases of original be "*à die Lunæ, &c.*" in all proceedings on original, yet it is taken inclusive.

POWELL, *Justice*. *Gage's Case* is very strong against you; but I believe there are many other cases contrary, and therefore it is fit to settle it fully. The practice of the common pleas will be a good guide in a writ of error from thence. In cases of necessity things are done on *the Monday* (*c*), as on appearance in a *writ of right*, where the law allows not of a *quarto die post*: a *Sunday* never was nor is a *dies juridicus* (*d*); but there is no necessity in this case.

Curia advisare vult (*e*).

(*a*)

(*b*) Plowd. 266.

(*c*) See Swan *v.* Broom. 3. Burr. 1600.

(*d*) See 3. Burr. 1597. and Maddox *Excheq.* 551.

(*e*) In S. C. 2. Salk. 626. it is said, that HOLT, *Chief Justice*, was of opinion, that this was not a case of *necessity*, because the writ might have been executed *sooner*, or returned at another day; and in S. C. 3. Salk. 346. that he was of the same opinion as in the case of Harvey *v.* Broad, ante, 148. 159. 196. in which case the judgment was reversed, S. C. 2. Salk. 621. See also Lord Cornwallis *v.* Hoyle, where it is held, that a writ of enquiry executed on a *Sunday* is void, Fort. 373. A *capias* was returnable in three weeks after *Easter*, *viz.* on *Sunday*, *April* 29, and on *Monday*, *April* 30, the defendant was arrested, at eight o'clock in the morning, and detained by the officer till ten o'clock: and the Court held the arrest and detainer illegal, for it was after the writ was returnable, Leveridge *v.* Plaistow, 2. H. Bl. Rep. 29.

Case 367. Parker *against* Clerk.

If a *parish-clerk* sue *churchwardens* in the spiritual court for money due to him by *custom*; *quære*, If the Court will grant a prohibition on the suggestion that there is no such *custom*.

A SUIT was instituted in THE SPIRITUAL COURT by a *parish-clerk* against *the churchwardens* for so much money by custom, due to him yearly, and leviable by them upon the parishioners.

A PROHIBITION was moved for upon suggestion of no such custom.

It was objected, that if there be no such custom they should have pleaded it below; and if, without receiving that plea,

S. C. 3. Salk. 87. S. C. Sett. & Rem. 195. S. C. Holt, 597. Godol. Abr. 167. 192. 2. Roll. Abr. 227. 234. 286. 2. Brownl. 38. Cro. Jac. 670. Mar. 101. Ben. 142. 304. Ld. Ray. 435. 10. Mod. 12. 1. Burr. 314. Cowp. 423. 2. Burr. 1043.

they

they would proceed, then would be the proper time for a prohibition; but they came for a prohibition too late, *viz.* after sentence. PARKER *against* CLERK.

HOLT, *Chief Justice.* I know no case where one comes too late for a prohibition after sentence (*a*) but that of suing one out of his diocese. Indeed, if a suit be there for a *modus*, and the defendant plead payment, he comes afterwards too late to plead or suggest that there is no *modus*, because he has admitted one by pleading a payment. But * here the matter lies: here is a duty not spiritual but temporal, and to a temporal person, for such is *a parish-clerk*; and therefore we grant *mandamus* to restore him to his place. This duty is founded upon a custom; and if there be such a custom, he is not without remedy at law; for he may have an action on the case for not making a rate and levying; or if they do levy it, and not pay him, he may have an *indebitatus* for money received to his use. * [253]

But THE OTHER JUSTICES doubted, looking upon the clerk to be an *ecclesiastical person*, and in inferior orders, and that as such he might sue in the spiritual court for a stipend or pension.

And a diversity was urged from THE BAR in the point of a spiritual person's suing in the ecclesiastical court for *a pension*, *viz.* that he might well do it only in the case of *pensions* originally granted or confirmed by THE ORDINARY; but that where *a pension* does not originally commence by the act of THE ORDINARY, there it cannot be sued for in the spiritual court: as if one should grant an annuity to a parson, he cannot, as was said, sue for it in the spiritual court; and for this was quoted *Colier's Case* (*g*).

A spiritual person may sue in the ecclesiastical court for *a pension*, although not originally granted or confirmed by the ordinary.

2 Inst. 487.
Cro. Jac. 217. 269. 666.
Cro. El. 810.

HOLT, *Chief Justice.* There is no diversity. But what sticks with me is, whether they have original jurisdiction here; which without doubt they have not, if they do not make the clerk a spiritual person, which will be hard to do: and if they have not original jurisdiction, one is never too late for a prohibition.

PER CURIAM. An action on the case will certainly lie against the churchwardens upon such a custom: as if the bailiff or reeve of a manor be bound by custom to collect money, an action on the case will lie against him for not doing it, and *indebitatus* after it is received.

Quære quid inde venit.

(*a*) Where after sentence prohibition lies, &c. Vide Show. 158. 273. Faresl. 148. Hob. 79. Post. 253. Ante, 11. 1. Sid. 332. 65. Win. 8. 1. Ro. R. 80. 2. Ro. 318. NOTE *to former edition.*

(*b*) Cro. Eliz. 675.—But see the case of Dr. Gooche *v.* the Bishop of London, 2. Stra. 879.

Tilsden

Case 368. Tilsden *against* Parsriman.

If a prisoner in custody of the marshal on *mesne process* escape, and being re-taken on an *escape warrant* under 1. *Anne*, c. 6. is committed to *Newgate*, and discharged therefrom on his entering into an agreement with, by the consent of, his creditor, he cannot be re-taken on a second escape warrant for not performing his agreement, or detained on his being afterwards in the custody of the marshal at the suit of another creditor.

TILSDEN being now in *Newgate* upon the warrant of a Judge, upon the statute 1. *Anne*, c. 6. *(a)* against prisoners escaping; and the regularity of that matter being now referred to MR. CLERKE to examine,

It was reported to him, that *Tilsden* had been indebted to *Parsriman*, and in prison of THE MARSHAL at his suit, and had escaped, and being taken up by a warrant, lay in *Newgate*; that afterwards *Parsriman* and he came to an agreement, whereupon, upon payment of a sum certain in hand, and a promise to make other payments hereafter, he consented to have him discharged out of *Newgate*; that afterwards *Tilsden* not performing his agreement, *Parsriman* endeavoured to get him arrested, but could not; that he was arrested at the suit of another, and committed to THE MARSHAL, who let him escape voluntarily; that afterwards he paid that plaintiff, but had no legal discharge from him; that *Parsriman* hearing of the new arrest went to THE MARSHAL, and asked him, If he had such an one in his custody? who answered, "*Yes*;" that he thereupon entered an action against him in the book that is kept in THE KING'S BENCH OFFICE, and afterwards got him arrested by process of * the court of king's bench, and kept him in custody thereupon until he got a Judge's warrant, whereby he was carried to *Newgate*.

* [254]

S. C. 1. Salk. 213. 345. S. C. 3. Salk. 150. Ante, 21. 63. 95. 154. Tidd, 193. Stra 410. 423. 3. Com. Dig. "Escape" (E.)

The commitment by this *warrant* was what was complained of.

DARNELL, *Serjeant*. The discharge out of *Newgate* is no discharge of the first action for the escape on which he was committed to *Newgate*; for the plaintiff, upon the escape out of the custody of THE MARSHAL, had his election to take the party upon a new action, or upon a warrant under the late act, or to have an action of escape against THE MARSHAL, and the taking up upon a warrant will be no discharge to THE MARSHAL; therefore the first action remains still undischarged, and THE MARSHAL may take him up thereupon; and if so, he is now wrongfully at large, and may be taken up by a Judge's warrant, as has been done.

Ante, 95. 154. 5. Mod. 232. 413.

But PER CURIAM, If one in custody of THE MARSHAL escape, and is taken upon a Judge's warrant, that is no new imprisonment, but a continuance of the old; and a discharge of that commitment will be a discharge of the first; but if he had escaped out of the county jail without the consent of the jailor, there the marshal might retake him: as if one be in custody of the marshal for debt, and escape, and after the same plaintiff takes him up upon another debt, and lets him go again, yet the marshal may retake him for the escape.

(a) See ante, 154.

THE

THE COURT agreed, that if a man be in custody two Terms without a declaration, he shall be discharged upon filing common bail.

Prisoner, how to be discharged, if no declaration in two Terms.

1. Salk. 213, 214. 3. Salk. 150.

And the way to charge one in custody in *Term-time* is by filing a bill against him, and delivering a declaration to the turnkey: after which he must lie two Terms, as to that party, before he can be discharged on common bail.

The way to charge a prisoner with an action in *Term-time* and in *Vacation*.

But in *Vacation*, there is no way but to make an entry in the book that is kept in the office of a *remanet in custodiâ mareschalli ad sect. de*, &c. and that is sufficient to charge him; but to make that suffice, the party must be actually in jail, and not escaped; for the reason why such entry is allowed good is, because of the necessity of the thing, the party having no other way to charge him when he is in actual custody (*a*).

Tidd, 196.

But upon an escape there is not that necessity, for he being at large may be arrested. Indeed, if the marshal will own a person to be in his custody who is not so, that shall conclude him, and subject him to an escape; but such confession of the marshal ought not to be conclusive to any but himself; and it is against a principle of the law to charge a man in custody who is not in custody; and the mischief of it would be very great. And this cannot be called taking advantage of the party's own wrong; for his escaping out of prison, where he is in custody at the suit of *A.* cannot be any wrong to *B.* though he be thereby deprived of the advantage of charging him in custody.

Time for declaring on a recaption. Ante, 21.

Indeed, if the marshal suffer one to be in and out at times, and during such time he is charged by a *remanet*, &c. though he were actually out of prison at that time, yet if he returned in again, that will be *quasi* a continuance of the first imprisonment; and by such return he may have notice of the charge: and the meaning of the statute whereby * the marshal is to acknowledge what prisoners he has, is only in order to charge himself.

See Jaques v. Wilkinson, 3. Term Rep. 392.

* [255]

And PER CURIAM, The second imprisonment in NEWGATE is irregular; but we cannot take notice of any thing until the warrant be returned: and the question will be, Whether we will relieve on motion, or put you to your *audita querela*?

(*a*) The method by which a prisoner may be charged in custody with *a new suit* in *Vacation-time* underwent great consideration in the case of Hutchins v. Kenrick, Trinity Term, 33. *Geo.* 2. and LORD MANSFIELD delivered the resolution of the Court upon this point to the following effect: "We have considered "the practice of this Court, and of that "of the common pleas, and we are of "opinion, that the right method is (like "that which is taken in the common "pleas) to *file a bill* as of the *preceding* "*Term*; and then to deliver or to leave "for the defendant, being in custody, a "*copy of the declaration* as of the preced- "ing Term; and to make an *affidavit* "thereof: and there is no occasion for a "*habeas corpus*." But see Rule Easter Term, 15. *Geo.* 3. "No declaration shall "be sufficient to detain such prisoner, "unless affidavit that the cause of action "amounts to ten pounds or upwards be "first made and filed with the clerk of "the rules, and the sum specified in such "affidavit indorsed in the declaration "before it is left with the turnkey."

Case 369. The Queen *against* Saintiff.

An indictment for not repairing "a common bridge "situated in a "certain "common *foot-"path*," is good, without stating, that it was in the *king's highway*: but the sessions have no power, by 22. *Hen.* 8. c. 5. with respect to *private bridges* not common in the highways, unless they are *public nuisances*, and then they have jurisdiction by 1. *Edw.* 3. c. 16

S. C. 1. Salk. 359.
S. C. Holt, 129.
S. C. 2. Ld. Ray. 1174.
Ante, 150. 191.
Post. 263. 307.
Ld. Ray. 725. 792. 804. 856. 1175. 1249
12. Mod. 13 198. 409.

AN INDICTMENT against him for not repairing *quendam communem pontem situm in quâdam communi semitâ pedestri*, leading from such a place to such a place, which he was bound to repair *ratione tenuræ* (*a*), and which he suffered to be *valde ruinos. et in magno decasu, &c. ad commune nocumentum omn. ligeor. dominæ reginæ illac transeun.* and judgment given thereupon at the quarter-sessions, of which error was now brought.

EYRE now objected to the indictment, that it did not lie; for it did not appear that the bridge was in *altâ regiâ viâ*, as it ought to have been *per lui*: for it was a term of art not to be supplied by any other words, no more than the words "*murdravit*," "*burglariter, &c.*" in indictments of murder or burglary (*b*). Then if it do not appear to be *a highway*, it must be taken to be only *a private way*, for the not repairing whereof an indictment does not lie.

Of the other side, in maintenance of the judgment, was quoted *West's Precedents*, 147. 156. 346.

EYRE further urged, that the power given to justices of peace in this case is by the statute of 22. *Hen.* 8. c. 5. which mentions, that they shall judge of decay in bridges in highways; therefore they ought to shew that this is such a bridge, and so pursue their authority (*c*).

HOLT, *Chief Justice*. An indictment lies not for not repairing *a bridge*, except it be in *a highway*, as MR. EYRE will have it; but the word "highway" is *the genus* of all public ways, as well cart, horse, and foot ways, and yet an indictment lies for any one of these ways, if they be common to all the queen's subjects having occasion to pass there; that is, if it be *a foot-way* only common to them all, or a *horse-way* and a *prime-way*; and these are not *altæ regiæ viæ*, for that is the great highway common to cart, horse, and foot, that please to use it: so that the term of *alta regia via* is not so necessary; and if there be a common foot-way for all the queen's subjects, if it be in decay, an indictment must of necessity lie for it, because an action on the case will not lie without a special damage.

Then as to the authority of the justices, they have a power by the statute of 1. *Edw.* 3. c. 16. by which they are created, to inquire of all public nuisances; and if this be a public bridge, *[256] * the suffering of it to be in decay is a public nuisance, and so within their jurisdiction.

So all that sticks with me is the manner of laying it; for the word *commune* does not *ex vi termini* import, that it is common to

(*a*) See 1. Hawk. P. C. ch. 76. f. 8. f. 14.

(*b*) Stamford's P. C. 96. 2. Inst. 701. Dyer, 304. 4. Co. 39. 1. Hale, 450. 4. Mod. 61. 1. Vent. 208. Palm. 389.

(*c*) 2. Inst. 701. 1. Salk. 359. 1. Hawk. P. C. ch. 77. f. 14.

all

all the queen's subjects, as it ought to do to maintain an indictment. And one of the precedents produced has the word "*publicus*," which is of wider extent than "*communis*," for there is common for two, three, or more; and it will be hard to understand the word "common" to be universal, to charge a man's freehold. And without doubt the conclusion will not help it, if so much be not expresly charged in the premises. And here it is not said to whom it is common. It is, therefore, very fit to see precedents before we determine it (*a*).

THE QUEEN *against* SAINTIFF.

Vide Fleta, 174. Ausow. Pop. 66.

(*a*) It is said, S. C. 2. Ld. Ray. 1175. that the exception to *communis fons* was over-ruled, and that the indictment was, in this respect, held well enough, on the authority of *Rex v. Thrower*, 1. *Vent.* 208. but they held the indictment naught, because it was *pons publicus* instead of *pedestris*, S. C. 1. Salk. 360.

Trevivan *against* Lawrence and Others. Case 370.

Easter and Michaelmas Term, 3. Anne. Roll 221.

Judgment is obtained in debt on bond in *Michaelmas Term*. A *scire facias* is brought thereon against the *terre-tenants* returned, and, on "*nul* "*tiel record*" pleaded, judgment is given for the plaintiff, and an *elegit* sued out. An ejectment is brought upon the *elegit*, and it is found, by special verdict, that the *scire facias* recited a judgment of *Trinity Term*. This, if discovered on the trial of the issue of "*nul tiel record*," must have prevailed as a *failure of record*; but the fact having been judicially tried and ascertained, the *terre-tenants returned* are estopped, by the award of execution on the judgment in the *scire facias*, from taking advantage of this *variance*; and so are the *terre-tenants not returned*, if they do not shew a *title paramount* to the judgment in the *scire facias*.—S. C. 1. Salk. 276. S. C. 3. Salk. 151. S. C. Holt, 282. S. C. 2. Ld. Ray. 1036. 1048. Ante, 134. Post. 304. 2. Keb. 47. 55 181. 415. 3. Keb. 212. 768. 3. Lev. 300. 1. Saund. 37. 2. Lut. 1267.

IN EJECTMENT, by an administrator, of lands in *Cornwall*, this special verdict was found:

That one *Stephen Robins* was seised of the premises in fee; that, he being so seised, the plaintiff's intestate sued him in debt upon a bond in such a court in *Westminster*; that in that suit judgment was given against the said *Stephen Robins*, in *Michaelmas Term* 1656; that in the thirteenth year of the late king a *scire facias* was brought by the now plaintiff against the now defendant, as *terre-tenant* of some of the lands whereof the said *Stephen Robins* was seised at that time or since; and that the defendant being summoned appeared, and pleaded "*nul tiel record*," and day was given to produce the record; at which day a judgment of *Michaelmas Term* was produced, and judgment and award of execution for the plaintiff thereupon; but that the *scire facias* brought by the plaintiff recited a judgment of *Trinity Term* 1656. And upon this award of execution an *elegit* was taken out by the plaintiff, and the lands extended, and in ejectment to get the possession the judgment given in evidence was that of *Michaelmas* 1656. And for *the variance* between the recited judgment in the *scire facias*, and that given in evidence, the jury doubted.

EYRE *for the plaintiff*. I agree the general rule, that whoever makes title under an *execution* must shew *a judgment* on which it is grounded; but here we need only to shew the judgment on the *scire facias*; for though it be upon *a judicial writ*, yet it is considered as *an action*, and may be released by that name (*a*). If judgment be against one, the attorney for the plaintiff may sue execution by virtue of his first warrant, yet a warrant in the original cause does not impower an attorney to appear to a

(*a*) Litt. sect. 503, 504.—See also 1. Wils. 99. 2. Wils. 251. 2. Black. Rep. 1227. 1. Term Rep. 46. 268.

TREVIVAN *against* LAWRENCE AND OTHERS.

scire facias upon a judgment in that cause, or the attorney for plaintiff to sue out a *scire facias* (*a*). A release of an action is a release of a *scire facias*, but a release of an action is no release of execution; therefore the *scire facias* is no execution, nor the judgment upon it more than a bare award of execution.

*[257] * BROTHERICK *contra*. A judgment on a *scire facias* is no new judgment to affect the land in this case, but is only an application of an ancient lien on the land (*b*). And this judgment does not alter the nature of the duty, nor create a new one (*c*). Indeed, an officer who justifies by virtue of a writ need not shew a judgment, but the party must always do it (*d*). And by him, a *scire facias* lies not upon a judgment on a *scire facias*.

HOLT, *Chief Justice*. If a *scire facias* recite a judgment of *Trinity Term* in debt, whereby all the defendant's lands whereof he was then, or at any time since, seised, are bound, and the tenants returned plead "*nul tiel record*," and a judgment of *Michaelmas Term* be produced, no doubt that is a *failure of record*. But the question is, when the record is produced, and judgment thereupon, Whether the defendants are not thereby concluded for ever? for to admit them to controvert it now would be to falsify the point tried, and that cannot be even by an issue in tail: as if, in a writ of entry, a recovery be against the ancestor of the issue in tail, the issue cannot falsify it in the point tried, but he may say that his ancestor omitted the giving such things in evidence which he can now give. And one may have a *scire facias* upon a judgment on a *scire facias*; and for this he remembered the case of *Obrien v. Ram* about fifteen years ago in this court (*e*). A judgment against a *feme sole*, who afterwards took husband before execution, and then a *scire facias* was sued against both, and judgment thereupon, and an award of execution against both, and then the wife died, and then a new *scire facias* is brought against the husband survivor, and it was adjudged that it lay. And another case since likewise in this court (*f*): A *feme sole* obtained a judgment, and before execution took husband, and then they brought a *scire facias* to have execution, and had judgment thereupon, and award of execution; the wife died, and the husband surviving had another *scire facias*, and it was held well. And he quoted the case of *Gilbert v. Bragg*, in the year 1655 (*g*): A judgment in debt was obtained against a tenant in tail, who died, and afterwards a *scire facias* was brought against his issue, who being returned "warned," made default; and though the lands in tail were not liable, yet he is concluded for ever: this is grounded on THE YEAR-BOOK of *Assizes* (*h*). A jury cannot find against an *estoppel* in a point tried; and so wherever there is *an estoppel* that affects the interest of the land, the jury

See Cro. Car. 150. 164.

(*a*) Titherley v. Welch, Cro. Eliz. 154.—See also 4. Bac. Abr. 409.
(*b*) 2. Keb. 499.
(*c*) See Micoc v. Morris, 3. Lev.
(*d*) Owen, 134. Bridgman, 72. Hetley, 150.—See also 3. Wils. 345. 376. 1. Black. Rep. 733. 868.
(*e*) 3. Mod. 186.
(*f*)
(*g*)
(*h*) 27. Ass. pl.

cannot

cannot find againſt it. It is true, if you come to ſpecial pleading, and it be reduced to a point in pleading, and the party then will not take advantage of it by relying thereupon, but will leave it at large, the jury is not eſtopped, but may find the truth. As ſuppoſe in this caſe the plaintiff had declared on a judgment in *Trinity Term* 1656, and the defendant had pleaded "*nul tiel record*," if he will join iſſue that there is ſuch a record, he is gone, becauſe the truth will be againſt him; but if he will ſay that there was a *ſcire facias* taken out againſt the defendant at ſuch a time, reciting ſuch a judgment as is now ſhewed in his declaration, and that the defendant pleaded "*nul tiel record*," and that was found againſt him the defendant, and conclude by relying on the eſtoppel, he is ſafe, and the defendant cannot offer any thing againſt it. * So if a demiſe be pleaded by indenture, and the other will ſay, "*Nil* "*habuit in tenementis*," and the plaintiff will ſay, "*habuit in* "*tenementis*," he thereby waives the matter of the *eſtoppel*, and leaves it at large, and the jury may find the truth; but if he had ſaid, that it being by deed under his hand and ſeal, he ought not to be admitted againſt his deed to aver that he had nothing, the truth could not be inquired into. But if the iſſue were upon "*nil debet*," where the point does not come in pleading, as in debt for rent where the demiſe is by deed, the party cannot give evidence of *nihil habet in tenementis*, nor the jury inquire of it: and when an *eſtoppel* runs upon the land it alters the intereſt of it; for if a man by deed indented make a leaſe of *Dale*, reſerving rent, in which at that time he has nothing, and afterwards he purchaſes *Dale*, and bargains and ſells it to a ſtranger, the bargainee ſhall hold it liable to the firſt leaſe, and, coming under him who made the leaſe, ſhall be eſtopped to ſay, that the bargainor had nothing to let the premiſes at the time of the leaſe made; for this eſtoppel runs upon the land, and alters the intereſt of it.

* [258]

3 Keb. 170. 324.
1. Keb. 95. 113.

V.de Hob. 207.

1. Salk. 276.
2. Mod. 115.
2. Keb. 364.
Raym. 21.
1. Lev. 43.
Ld. Ray. 59.

THIS CASE having been thus ſpoke to in *Eaſter Term*, pended in conſideration until this Term: when

PER TOTAM CURIAM, Judgment was given for the plaintiff,

HOLT, *Chief Juſtice*, putting the caſe ſhortly thus: A *ſcire facias* by an adminiſtrator upon a judgment in *Trinity Term*, the record being in truth of that Term, but no judgment until *Michaelmas Term*; and the defendants being all, except one, returned, plead "*nul tiel record*;" and the record of *Michaelmas Term* produced, and judgment on the *ſcire facias*, and an award of execution, *elegit* taken out, and an extent thereon and an ejectment brought to get poſſeſſion; and now it is found out, that there was no ſuch judgment as the *ſcire facias* recited: What then? All theſe perſons are eſtopped; for now they are not bound on the plaintiff's ſide to give the record of the original [illegible] evidence, but only the award of execution on the [illegible] as; for being all, except one, returned tertenants, they are [illegible] except him, eſtopped thereby from ſaying, that there was no ſuch judgment; and as to him too, he is eſtopped if he do not ſhew a title

 paramount

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paramount the judgment on the *scire facias*, for this is an estoppel that works upon the interest of the land; and it is like a judgment against one who is afterwards disseised, or a *scire facias* against an issue in tail, who makes a default, or pleads other plea which is found against him, whereby execution is awarded, he shall not afterwards be admitted to say, that his ancestor was tenant in tail, and he heir to the intail. Even upon the estoppel the plaintiff in the judgment shall maintain an ejectment; as if a man make a lease by indenture of land which is not his, and after purchase it, that lease shall bind him, his heirs, and assigns; and an estoppel that affects the interest of the land shall run with it to whoever takes it; and none that are parties to, or claimants under, this recovery, shall falsify it.

And judgment was given for the plaintiff.

* [259]

Case 371.

* Fitz Hugh *against* Dennington.

If a *master* give a bond to make his *apprentice* free of the city at the end of seven years, *if requested*, the defendant may plead, to an action of debt on this bond, "that "at the end of "seven years, "or after, he "was not re-"quested, &c." for he was not bound to do it, except upon request made at the time appointed for the performance.

S. C ante, 227.

S.C. 2. Salk, 585.
S.C. 3. Salk 309.
S. C. Holt, 68.
S.C. 2. Ld. Ray. 1094.
1. Cro. 179. 280.
2. Cro. 183. 652.
2. Bulst. 229.
Yelv. 66.
3. Bulst. 297.
10. Mod. 519.
12. Mod. 413. 455. 461. 503.
Gilb. E. R. 251.

THIS CASE being moved again, BROTHERICK urged that the plea was naught, and therefore judgment ought to be affirmed. We were to be made free, at the end of seven or eight years from the date of the bond, of THE COMPANY OF JOINERS, if we desired it: then the election is ours, to be made free at the end of seven years, or else at the end of eight; and this ought to be determined in some convenient time before the end of seven years, that the obligor might have all things ready to perform his condition, which was to be at the end, that is, the last day of the seventh year: and how has the obligor discharged himself by saying, that we have not requested him at the end of seven years, or ever after before the action brought? for a request before the end of seven years, in such convenient time as the obligor might have reasonable time to get us made free at the end of seven years, would be a good request to entitle us to our action; and that would not come within their plea. If one be bound to pay twenty pounds, or twenty kine, in a month, at the election of the obligee, there the obligee is to make his election in a convenient time, that the obligor may provide what he chooses, and need not provide both (*a*). So if one be bound to make the obligee a conveyance by fine or feoffment by such a day at the election of the obligee, the obligee is to determine his election in a convenient time before the end of the Term (*b*). So here we were to make a request in a convenient time before the end of seven years, and they have not denied that we have so done; but only say, that we have not done it at the end of seven years. 1. *Lev.* 68. 1. *Ro. Ab.* 374. *Bridgm.* 41. *Aleyn*, 25. *Style*, 49. 74.

HOLT, *Chief Justice*. The obligor was to make him free at the end of seven years, or eight years, if thereunto requested. Let us then go by steps: Suppose it were to make him free at the end

(*a*) (*b*)

of

of seven years, if thereunto requested, and the defendant pleads, that at the end of seven years he was not requested; Why is not that a good plea, for it is directly the words of the condition? But what shall be understood to have been meant by "the end of seven "years?" Whether after they are expired, or just at the end of them, so as he ought to be made free on the last day of the seven years? When a man is to do a thing by such a time if requested, there if the thing in its nature may be done at the time of request, then the request is to be made on the last convenient part of that time: as if a man be bound to pay money on *Lady-day* if requested, there the request is to be on the last convenient time before sun-set of that day, on which such a sum may be paid; and if it were a thing the doing whereof required more time, ought not that to come on the plaintiff's side in his replication? And he took it clearly, that the request here ought to have been on the last most convenient time of the last day of the seventh year, and that it would come too late the next * day: as if lessee covenant to leave all things in good order, and to vacate the premisses at the end of his term, he must do it on the last day, and cannot save his covenant by doing it the day after; for the end of a thing is part of that of which it is an end: but here the condition being, "at the end of seven or eight "years," if the plea had been, that he did not request at the end of seven years, without going further, it had been bad.

FITZ-HUGH *against* DENNINGTON.

* [260]

POWELL, *Justice*, seemed to incline, that a request in a day or two after the seven years would be well; though he agreed, that, in demand for rent it must be on the last convenient time of the day, because there the law appoints a place where the request is to be made; but this must be a personal request, and no place appointed for it.

Vide Farest. 143, 144. Pal. 321.

HOLT, *Chief Justice*. In a bond where there is no demand for the payment of money at such a day and place, the obligor must bring the money the last part of the day to the place; and if there be no place appointed, he must seek him out, if he be in *England*. If there be a place appointed, and he has an election to do the thing on or before the day, there he may give the obligee notice to be there at the day; and if he do not come, and the obligor is there and tenders, he saves his bond: as if a man be bound to enfeoff one of lands in *York* the last day of *November*, and the covenantee stay here in town; yet if the covenantor do not go down and tender, he breaks his covenant. And there is a difference when a time is appointed and when not; for if a feoffment be to be made at such a time if requested, there the request is to be made at that time; but if there be no time fixed, then the request is to be made at some reasonable time before, and the feoffment need not be made immediately thereupon: and the case in 1. *Roll. Abr.* 443. for payment of money in *Holland* on request, and a request in *England* was held good, is upon this diversity.

1. Bac. Abr. 279.

FITZ-HUGH *against* DENNINGTON.

2. Salk. 585.

And now HOLT, *Chief Justice*, and POWELL, *Justice*, The end of seven years must be the last convenient time of that day; and it is just like a demand, which must be on such time as the thing may be done on. Indeed, if you had come and said, that the defendant was a great way off on the last day, it had been something; and though the end of the day be the last instant of it to many purposes, yet as to acts to be done thereon it is not so; for day then is between sun-rise and sun-set, which is the time for men to work on; and therefore if a demand be to be on *Midsummer-Day*, it may be good at eight of the clock in the afternoon; whereas in *December* it must not be much after four.

Vide 2. Danv, 264.

S. C. 1. Salk. 40. 44.

And HOLT, *Chief Justice*, said, that it had been adjudged that if one be born on the first of *February* at eleven o'clock at night, and on the last of *January* in the one-and-twentieth year, at one of the clock in the morning, he makes his will and dies, such will is good, * for he then was of age.

* [261]

And THEY ALL AGREED, that the plea was good, though they differed about the time on which the request was to have been made, *viz.* whether on the last day of seven years, or after.

The judgment was unanimously reversed.

Case 372.

Leicester *against* Foy.

Quære, Whether it be a good *modus* to pay from *April* to *November* every tenth day's milk skimmed and made into cheese, in lieu of all tithe milk.

S.C. 2. Ld. Ray. 1171.
Bunb. 28. 73.
Ld Ray. 129. 359.

PROHIBITION was moved for to stay a suit, by a vicar, in the spiritual court, for *tithe-milk*, upon a suggestion of a *modus*, that the inhabitants of that place did, from such a day in *April* until *All Saints*, pay every tenth day's milk skimmed, and made into cheese, and *ratione inde* were discharged of all *tithe-milk*.

EYRE *against the prohibition*. It is true, making the tithes of one crop into hay, will be a good caus· of discharge of tithe of aftermowth. But he denied that it would be a good *modus* to say, that for making the aftermowth into hay, they should be discharged of tithe of the first crop: and this *modus* amounts to a *non decimando* of the cream.

Contra was urged the case of *Austin v. Lucas (a)*, a *modus* to pay the tenth cheese made from such a time to such a time in lieu of all *tithe-milk*, and though it be but for part of a year, yet being what they are not bound to do, it is a good discharge of *tithe-milk* all the year *(b)*. Suppose it were to pay *a groat* a year for all *tithe milk*, it would be well; and why not this?

And though THE COURT did not like the *modus*, as seeming very severe on the vicar; yet to settle the point, which they

(a) Cro. Eliz. 609. Moor, 909.
(b) See Latch, 222. Raym. 277.

thought

thought of great confequence, they granted *a prohibition* directing them to declare forthwith (*a*).

(*a*) The declaration came on to be argued in Trinity Term, 4. *Anne*; but the decifion of the queftion was evaded by the Court granting *a confultation*, becaufe the plaintiff had not proved his fuggeftion within the fix months required by 2. & 3. *Edw.* 6. c. 13. f. 14. which act, it was agreed, extends to prohibitions to fuits for *fmall tithes* as well as great, S. C. 2. Ld. Ray. 1172.—But fee Hill *v.* Vaux, 1. Ld. Ray. 358. S. C. 2. Salk. 656. S. C. Carth. 461. S. C. 12. Mod. 206.

Goddard *againſt* Smith. Cafe 373.

Declaration in cafe on confpiracy for a falfe and malicious indictment of barretry, whereof he was acquitted.

Salk 21. 6. Mod. 261. 3 Salk. 245. Rep. A. Q. 56. Holt, 497. S. C.

MIDDLESEX, } BE IT REMEMBERED, that heretofore, that is to
to wit } fay, in the Term of the *Holy Trinity* laft paft, before our lady the queen at *Weftminfter*, came *Richard Goddard*, by *Henry Wright* his attorney, and brought into the court of our faid lady the queen then there his certain bill againft *Richard Smith* and *Chriftopher Prefton*, in the cuftody of the marfhal, &c. of a plea of trefpafs upon the cafe; and there are pledges of profecuting, namely, *John Doe* and *Richard Roe*, which faid bill followeth in thefe words, that is to fay: *Middlefex*, to wit, *Richard Goddard* complains of *Richard Smith* and *Chriftopher Prefton*, in the cuftody of the marfhal of the *Marfhalfea* of our lady the queen, before the queen herfelf being, for that, to wit, that whereas the faid *Richard Goddard* is a good, true, faithful, peaceable, and honeft fubject and liege man of our lady the now queen, and was of a good name, fame, reputation, converfation, behaviour, and condition, and as a good, true, faithful, peaceable, and honeft liege man and fubject of the faid lady the now queen, being without any fcandal, imputation, or reproach, and hath not behaved or demeaned himfelf at any time from the time of his nativity hitherto as a barretor or difturber of the peace of the faid lady the queen, nor was in fufpicion of the like crime amongft his neighbours and other fubjects of the faid lady the queen to whom the faid *Richard Goddard* was known, and by reafon of his honeft and quiet converfation aforefaid, for the whole time aforefaid, lawfully and honeftly gained and acquired great credit and efteem, and alfo divers great gains and profits from his neighbours and other fubjects of our faid lady the queen, with whom the faid *Richard Goddard* had commerce for the fupport of himfelf and his family: neverthelefs the faid *Richard Smith* and *Chriftopher*, not ignorant of the premifes, but contriving and malicioufly intending not only to deprive him the faid *Richard Goddard* of his good name, fame, and efteem aforefaid, but alfo to bring him the faid *Richard Goddard* into ignominy and public difgrace, that by reafon thereof the fubjects of the faid lady the queen might withdraw themfelves from the fellowfhip of him the faid *Richard Goddard*, and might altogether ceafe and defift from dealing and having commerce with him in any manner, on the [illegible] day of *September*, in the firft year of the reign of the faid lady *Anne*, now *Queen of England*, &c. at the parifh of [illegible], *Clerkenwell*,

GODDARD *against* SMITH.

Clerkenwell, in the county aforesaid, then and there having had a conspiracy between themselves falsly and maliciously to cause the said *Richard Goddard* to be indicted as a barretor and public disturber of the peace of the said lady the queen, without any cause or colour of such crime being committed by him the said *Richard Goddard*, they the same *Richard Smith* and *Christopher*, at the parish aforesaid, in the county aforesaid, in prosecution and execution of their malicious intention and conspiracy aforesaid, at the general quarter-sessions of the peace of our lady the queen held for the county of *Middlesex*, at *Hicks's Hall*, in *St. John Street*, in the county aforesaid, before *John Bennet*, *Henry Hawley*, and *Joseph Offley*, *Esquires*, and other their fellow justices of the said lady the queen, appointed to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, contempts, and misdemeanors, in the same county committed, falsly and maliciously caused and procured the said *Richard Goddard*, with intent to defame the same *Richard Goddard*, without any lawful or true cause, to be indicted by the name of *Richard Goddard*, late of the parish of *St. James*, *Clerkenwell*, in the county of *Middlesex*, yeoman, for that the same *Richard Goddard*, on the first day of *January*, in the first year abovesaid, and divers other days and times as well before as afterwards, at the parish aforesaid, in the county aforesaid, had been and then was a common barretor, and a common, daily, and public disturber of the peace of the said lady the now queen, and also a common and turbulent slanderer and sower of quarrels and discords amongst his quiet and honest neighbours, so that he moved, procured, and stirred up divers contentions and controversies, and also brawlings, quarrels, and fights, at the parish aforesaid, in the county aforesaid, and elsewhere in the said county of *Middlesex*, amongst divers liege subjects of the said lady the queen, to the great disturbance of the peace of the said lady the now queen, to the evil example of all others in the like case offending, and against the peace of the said lady the now queen, her crown and dignity, &c. and did falsly and maliciously prosecute and cause to be prosecuted the said indictment against the said *Richard Goddard*, until the said lady the now queen caused that indictment afterwards, for certain reasons, to come to be determined before her: and the sheriff of the county aforesaid was commanded that he should not omit, &c. but cause him to come and answer, &c. And he the said *Richard Goddard* afterwards, to wit, in the Term of *St. Michael*, in the second year of the reign of the said lady the now queen, in the court of our lady the queen, before the queen herself, the same court being at *Westminster*, was, according to the law and custom of this kingdom of *England*, in a due and lawful manner thereof discharged. By pretence of which said premises against him the said *Richard Goddard*, by the said *Richard Smith* and *Christopher Preston* in form aforesaid published, done, exhibited, and prosecuted, the same *Richard Goddard* is not only very much hurt and injured in his good name, fame, credit, and reputation aforesaid,

Indictment at *Hicks's Hall*.

Removed by *certiorari*.

Discharged.

aforesaid, and disquieted and weakened in his body, but was also forced to expend and lay out divers large sums of money in and about acquitting and discharging himself of the said indictment, and defending his innocence, to the very great discredit and extreme impoverishment of him the said *Richard Goddard*, and to the damage of the said *Richard Goddard* of twenty pounds; and thereupon he brings suit, &c.

And now at this day, to wit, *Monday* next after three weeks from the day of *St. Michael* in this same Term, till which day the said *Richard Smith* and *Christopher* had leave to imparl to the said bill, and then to answer, &c. before our lady the queen at *Westminster* comes as well the said *Richard* by his said attorney as the said *Richard Smith* and *Christopher* by *Edmund Butler* their attorney: and the said *Richard* and *Christopher* defend the force and injury, when, &c. and say, that they are in no manner guilty of the premises above laid to their charge, as the said *Richard Goddard* above complains against them: and of this they put themselves upon the country; and the said *Richard Goddard* likewise, &c. Therefore let a jury come thereupon before our lady the queen at *Westminster*, on *Monday* next after the morrow of *Souls*, and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

Goddard *against* Smith. Case 374.

A declaration for maliciously indicting the plaintiff for *barretry* without probable cause, stating, that he was in due manner thereupon *discharged*, is not maintained by evidence that he was discharged by means of a *nolle prosequi* entered by THE ATTORNEY-GENERAL; but if he had pleaded *not guilty*, and the attorney-general had *confessed* the plea, that would have maintained the declaration.—S. C. 1. Salk 21. S. C. 3. Salk. 245. S. C. 11. Mod. 56. S. C. Holt, 497. Ante, 25. 216. 2. Salk. 456. Ld. Ray. 721. 1. Hawk. P. C. ch. 72. § 2. 1. Bl. Rep. 385. 1. Bac. Abr. 62, 63.

CASE for maliciously indicting him of *barretry* without *probable cause*, setting forth, that he was *debito modo inde exonerat.*

At the trial, to prove the declaration the plaintiff produced a *nolle ulterius prosequi* by THE ATTORNEY GENERAL.

HOLT, *Chief Justice*, doubting whether this evidence maintained the declaration, and strongly inclining that it did not, reserved it for the opinion of the Court; and he said, that the entering a *nolle prosequi* was only putting the defendant *sine die*, and so far from discharging him from the offence, that it did not discharge any further prosecution upon that very indictment, but that, notwithstanding, new process might be made out upon it; and sure it is hard to allow a man who gets off by a *nolle prosequi* to maintain an action for a malicious prosecution. Indeed, if he had pleaded *not guilty*, and THE ATTORNEY GENERAL had confessed it, that would have done; but he who gets off upon a *nolle prosequi* does not

GODDARD *against* SMITH.

* at all get off on the merits of the cause; and to maintain *a conspiracy*, it is necessary to lay and prove an acquittal (*a*). So in an action for suing for a great sum in order to hold to extravagant bail, the plaintiff must shew what became of that cause in order to maintain his action; and so is my *Lord Hobart*. But this here is not so much as *a nonsuit*, for the indictment stands still in force, and THE ATTORNEY GENERAL must make new process upon it when he pleases. But he remembered a cause about twenty years ago, in which WYNDHAM, *Justice*, directed for the plaintiff on the same point, and said, he thought it hard even at that time.

A *nolle prosequi* does not discharge the *crime*; it only puts the defendant *without day*; and therefore the attorney-general may issue *other process* on the indictment; but an *acquittal* goes to *the fact* charged.

MOUNTAGUE urged, that it is *attornat. dominæ reginæ ipsum, &c. inde non vult ulterius prosequi*: so he would have the *inde* to go to the fact charged.

But THE WHOLE COURT was of a contrary opinion; for at most it can go but to that indictment, and cannot be pleaded to a new indictment for the same offence, for a *nolle prosequi* at that rate would amount to a pardon.

1. Salk. 21.
1. Sid 420.
2. Salk. 456.
1. Vent. 33.
1. Keb. 521.
5. Mod. 394.
4. Com. Dig. "Indictment" (K.). "Justices" (W. 3.).
10. Mod 216. 152.
12. Mod. 648. 654.
3. Peer. Wms. 499.

POWELL, *Justice*. In all cases of conspiracy the *inde acquietat.* goes to the fact charged, and not to the indictment; for if it went to the indictment, and the indictment were vicious, conspiracy would lie, but that is not so; and colourable proof would destroy this action; and the plaintiff by procuring this *nolle prosequi* bars the defendant from giving such proof; and this action cannot be maintained but upon an acquittal, of the fact charged, by verdict, confession, &c.: but he doubted of the effect of a *nolle prosequi* upon an indictment, whether it discharged the indictment, or only put the defendant *without day*, and that notwithstanding THE ATTORNEY-GENERAL might issue new process upon it.

HOLT, *Chief Justice*, said, that he had known it thought very hard that THE ATTORNEY GENERAL should enter *nolle prosequi* upon *indictments*, and that it began first to be practised in the latter end of *King Charles the Second*'s reign, but that on *informations* it had been frequently done: and he ordered precedents to be searched if any were in *Mr. Attorney Palmer* or *Nottingham*'s time.

HARCOURT, *Master of the Office*. There never has been any proceedings after a *nolle prosequi*.

In *barretry*, the particulars must be given.

And PER OMNES, In case of *barretry*, the defendant upon motion may have a rule to have articles delivered to him of the instances, and the prosecutor shall not give evidence of any particular but what he has given articles of; and if the prosecutor give no articles, he shall give no evidence.

HOLT, *Chief Justice*, at another day, declared, that in all *King Charles the First*'s time there is no precedent of a *nolle prosequi* on an indictment.

(*a*) 8. Co. 58.

GOULD,

GOULD, *Justice*, quoted a case in *Hardres (a)*, where it was entered on record on an *information*, and held to be a discharge of it. GODDARD *against* SMITH.

THE COURT seemed all clear, that the action did not lie, but gave no rule.

(*a*) Hard. 126. 153.

*[263]

* Anonymous. Case 375.

HUSBAND AND WIFE came into court to acknowledge a deed made by them both, and THE COURT ordered an acknowledgement only of one of them to be entered, *viz.* of the husband.

Baron and *feme* acknowledge a deed in court.

Ld. Ray. 521. 2. Vern. 61. 471. 591. 11. Mod. 196. 12. Mod. 444. 609. 3 Peer. Wms. 189. Cases Temp. Talbot, 41. 164. 167.

Cockroft *against* Smith. Case 376

THE PLAINTIFF declared as *clerk of the court*. The defendant pleaded, that he was *an attorney* of the court, ABSQUE HOC that he is a clerk of the court. The plaintiff replied, that he is a clerk of the court, *prout patet per record. inde residen. in cur.* and prays the record may be inspected. The defendant would demur, and not join in the issue; whereupon the plaintiff signed his judgment.

Plaintiff declared as clerk of the court, &c.

PER CURIAM. The plaintiff is regular, and made the replication the true way without desiring the record to be brought in.

And the defendant was forced to pay costs to have the judgment set aside.

Buxom *against* Hoskins. Case 377.

ERROR was brought of a judgment in ejectment: and the plaintiff not assigning error, the defendant in error brought a *scire facias* against him to have execution, reciting a judgment of *two messuages, &c.* whereas the judgment in truth was *de uno messuagio*. And to this the plaintiff pleads *nul tiel record*.

It was now moved to amend it; and for amendments of *scire facias* were quoted, 1. *Roll. Abr.* 197. 797. 22. *Edw.* 4. 6. 2. *Keb.* 175. 2. *Cro.* 372. *Br. Abr.* 20. *sect.* 20. 3. *Cro.* 760. 2. *Sid.* 7. 12.

HOLT, *Chief Justice*. This sort of *scire facias* is always to have *execution*, and the writ thus mentions it; and the plaintiff in error may,

If a writ of error be brought on a judgment in ejectment, and, on neglect to assign error, the defendant bring a *scire facias quare executionem non*, and recite the judgment to be of *two* messuages, when it was only of *one* messuage, the variance cannot be amended after "*nul tiel record*" pleaded.—S. C. post. 310. S. C. 1. Salk. 52. S. C. 3. Salk. 32. S. C. Holt, 58. 762. S. C. 2. Ld. Ray. 1057. Post. 286. 8. Mod. 313. 366. 1. Stra. 401. 2. Stra. 1165.

Byrom against Hoskins.

may, if he please, plead to it a writ of error brought, and still depending, and assign error.

And Holt, *Chief Justice*, and the rest of the Court, There is a difference when the writ is bad and vicious on the face of it, and when it is good in the frame of it, but not fitted to that particular purpose; and all the cases put of amendment are of the first kind; and some colour there would be to amend in this case if the defendant had appeared and pleaded some other plea, or had taken no advantage of this slip, so as the proceedings would have been vitious without amendment; but here he having taken advantage of this slip by pleading *nul tiel record*, shall we vitiate his plea by an amendment? And they agreed, that wherever an original was amendable, there a *scire facias* would be so too; but said, that this would not be amended in an original writ * of error. Why? Because it is a good writ, and would well remove the record it describes if any were; and quoted the cases of *Hamond v. Jersey* (a), and *Thomson v. Crocker* (b). And he said, if a *formedon* were made for ten acres, when the instructions given are for twenty, he doubted it could not be amended; for the statute is to cure only mistakes of clerks which would endanger the reversing of judgments, and not to alter matters of fact, by extending it further than it was before; and if this writ be good in itself, but not *ad idem*, the party may take out another writ pending this; for if this writ be not *ad idem*, it cannot be pleaded in bar of the other; and against the case of *Wheaden v. Jugg* (c), which Holt, *Chief Justice*, said was a great strain, was quoted the case of *Walker v. Riches* (d), and to amend this writ were quite to alter the nature of the writ after it is returned and executed; which ought not to be.

* [264]

Vide post. 269, 270, &c. 2. Show. 304, 305.

Et per Curiam, No amendment.

(a) Easter Term, 9. *Will.* 3.
(b) 12. *Will.* 3.
(c) Cro. Jac. 372.
(d) Cro. Car. 162, 163.

Case 378.

Ward *against* Apprice.

If one of several partners receive money on the joint account, and give his *note* for it, and enter his expenditures in the partnership-books, and then the other partners possess themselves of the books, and bring an action against him for the monies he received to their use, the Court will not *order* the plaintiffs to produce the books at the trial, but the defendant may give them *notice* so to do, and thereby raise a presumption against them if they refuse.— 1. Salk. 285. 2. Salk. 690. Ld. Ray. 340. 737. 851. 871. 920. 927. 1285. 8. Mod. 166. 242.

An indebitatus assumpsit for money received to the plaintiff's use.

Brotherick opened this matter at the bar, that the plaintiff, the defendant, and several others, were part-owners of a ship, and several sums of money were given by the rest of the part-owners to the defendant, for the use of the ship, for the receipt whereof he had given a note; that the defendant had actually laid out the said sums on the ship and voyage, and entered an account of the manner, &c. in a certain book kept for the affairs of the ship; and then an allowance thereof was entered likewise in that book, which book did belong to the plaintiff, the defendant, and the other part-owners in common, and now was in the plaintiff's possession.

And upon this matter, made out by *affidavit*, HE MOVED, that the plaintiff ſhould either produce that book at the trial, or let the defendant take copies of ſuch entries and allowances of payment therein as would be proper for him to make his defence by; and ſaid, this ought to be as well as if a man bring an action of covenant upon an indenture, and the defendant ſwear that he never had a copy, you will not compel him to plead until the plaintiff furniſh him with a copy. *Ward against Apprice.*

Quod Cur. conceſſ. But here the defendant ſhould have taken up his NOTE upon the account allowed. You have entruſted him with the cuſtody of this book; and if he has broke his truſt, you muſt ſeek for remedy in equity. If an action be brought by a ſhopkeeper for money due on the ſale of goods, we never enforce him to produce his books; but if very ſlender evidence be given againſt him, then, if he will not produce his books, it brings a great ſlur upon his cauſe.

HOLT, *Chief Juſtice*, ſaid, that the plaintiff would do well to conſider, whether an *indebitatus aſſumpſit* would lie in this caſe.

And they would do nothing in it.

THE COURT, notwithſtanding, owned it to be a miſchievous caſe, where many are tenants in common, or copartners in a trade, and have one common book of their tranſactions, and one has the poſſeſſion of it, and then brings actions againſt the others. [265]

Gree *againſt* Sharp. Caſe 379.

EJECTMENT upon a demiſe at ſuch a place in *Devonſhire*, of lands in another vill in the ſame county, and the *venire fac'as* was from the place of the demiſe. The cauſe being carried down, and *a view* granted, there being a jury and a *decem tales*; now, at the trial, a panel was returned promiſcuouſly of the jury, and *decem tales*.

New trial on account of a panel being returned improperly.

1. Keb. 179. 418.
3. Keb. 103. 254. 485.

And for this irregularity *a new trial* was now granted.

PER CURIAM. In ejectment, *the venue* ought to come always from the place where the lands lie, and not from the place where the demiſe is laid to be made: but that fault is cured after verdict by the *ſtatute of Oxford*.

The *venue* in ejectment muſt come from the place where the lands lie.

S. C. Holt, 404. 2. Salk. 665. 545.

HOLT, *Chief Juſtice*. There is a difference between the practice of common pleas and this court, in caſe of *views* granted (*a*). If upon a full jury in the common pleas *the view* be granted, and a juror withdrawn, an entry is made of this, and proceſs continued againſt the jury, and a *decem tales* awarded on THE ROLL, and there may be a command of a *tales de circumſtantibus*

The different practice of the court of *king's bench* and *common pleas* on granting *a view*.

(*a*) See 4. *Ann*, c. 16. ſ. 8.

beſides;

GREE *against* SHARP.

besides; but in the king's bench, if a full jury appear, and *a view* be granted, and a juror be withdrawn, they take no notice of it by entry, but only grant a new *distringas* against the same jury, except the juror withdrawn; but if there be a *decem tales* awarded here, and a jury appear, and *a view* be granted, there they must take notice of it by entry, and continue process against the jury, and *decem tales*; otherwise the *decem tales* would be discharged: and *the distringas* of the *decem tales* must be the same *decem tales* returned upon the first writ; and to mix the persons returned on the principal panel, and the *decem tales* in the panel that tries the cause after the view, is irregular.

Therefore the verdict was set aside.

Case 380. Strong *against* Courtney.

An agreement that a man shall enjoy certain lands which are in his possession, and charged with an annuity to a third person, without molestation from the annuitant, is not a sufficient consideration for a promise.

S. C. Ld. Ray. 1217.

SPECIAL ASSUMPSIT, setting out, that whereas *James Turner* had a rent-charge issuing out of the defendant's land, the defendant, in consideration the plaintiff would indemnify and save him harmless against all distresses to be taken by *James Turner*, out, of, or upon, the premises, promised to pay him such a sum. Upon *non assumpsit*, and verdict for the plaintiff,

IT WAS URGED, that no right of distraining appeared for the said *James*, therefore no consideration for the promise.

And of this opinion was ALL THE COURT, though it was after verdict; which, they said, would not cure the want of consideration; but that, if it had appeared that the rent had been assigned to *James*, it would have been otherwise.

S. C. Salk. 364. Carth. 446. 10. Mod. 294. 11. Mod. 147. 214. 12. Mod. 16. 214. 250. 308.-324. Fitzg. 202. 303. Comy. 98. Ld. Ray. 368. 1. Stra. 94. 653. 2. Stra. 933.

*[266]

Case 381. * Garibaldo *against* Cagnoni.

Bail was formerly liable only when the plaintiff did not recover *a greater sum* than that which was laid in the action; for if he did, the bail was thereby discharged from his recognizance; but now in the *king's bench*, bail are liable to the sum sworn to and indorsed on the writ in the actions in which they became bail, and any *lesser sum*, and also to *the costs* of such action; but in the *common pleas*, the bail-bond being taken in double the sum indorsed in the writ, they are liable to satisfy the whole debt due, to the extent of *the penalty*.— S. C. 1. Salk. 102. S. C. Holt. 89. 1. Sid. 276. 307. 2. Keb. 101. 1. Mod. 8. 2. Keb 552. 2. Sid. 425. 1. Ven. 44. 1. Com. Dig. 602. 8. Mod. 227. 11. Mod. 275. Stra. 522.

A CONVICTION upon an indictment of battery being against *Garibaldo*, he, in consideration that *Cagnoni* the prosecutor would not press for a great fine, undertook to put in *special bail* to an action of trespass to be brought by the plaintiff for the said battery.

At this time, a writ which the plaintiff *Cagnoni* had taken out, and returnable in *Michaelmas Term* past, was run out; and in *Hilary Term* bail was put in, and, after a trial, one hundred pounds damages were given to the plaintiff.

And now a *scire facias* being against the bail, they applied to the Court for relief; for that the *ac etiam*, which was by leave put in

the said writ in *Michaelmas Term*, was only forty pounds, and the bail meant to undertake for no more; and since the plaintiff had declared to more damages, and recovered more, the bail were thereby altogether discharged: and a rule of Court said to have been made in the twenty-second year of King *Charles the Second*; and found by MR. CLARKE in the then secondary's book, that in case of bail, if the recovery were for more than was mentioned in the *ac etiam*, the bail should not be charged at all *in istâ actione*, was very much insisted on. GARIBALDO against CACKONI.

HOLT, *Chief Justice*, remembered a case of *Thomson v. Collins (a)*, in which he had been of counsel, in my LORD PEMBERTON'S time; where in an *indebitatus assumpsit* the declaration and recovery was for more than the *ac etiam*; and there, though it was offered to level it with the *ac etiam* by entering a *remittur* on the record for the rest, it was denied them on debate.

NOTE, In this case upon search, this rule could not be found in the clerk of the rules book.

HOLT, *Chief Justice*, said, there was reason for such a rule to pursue the act 13. *Car.* 2. c. 2. that bail should know what they came bound for, and not to be saddled with more; and that must be by recovering no more than was mentioned in *the writ*, to which the bail of necessity must relate: whereas if the plaintiff recovers more, the bail, if at all liable, must be liable for what is recovered; for their condition is to answer the condemnation, or render the principal; and it would be extreme hard to ensnare the bail to a greater sum than is mentioned in the writ: and since the process against them must be founded upon the judgment, it seems from thence they must answer for all or none; but if less than is mentioned in the writ be recovered, then there is no inconveniency to the bail; and if there be no bail insisted on but common bail, it is but just the wrong-doer should answer whatever is recovered. And he further said, that in cases of outrageous batteries, when people came to him for leave to charge with *ac etiams*, he would give leave to charge with a good sum; but when they came for bail, they must be content with bail of reasonable value, and not insist upon their worth in proportion to the sum charged.

* POWELL, *Justice*, and the rest, agreed, that bail by no means ought to answer for more than was mentioned in the *ac etiam*. * [267]

POWELL, *Justice*, added, that if such a rule, as was mentioned, had been, the reasonable construction of it would be, not to suffer the bail to be charged with more than was mentioned in *the writ*, but likewise not to discharge them for good and all; for though it be true that the process against them must be for the sum recovered, yet he said the Court might hold the plaintiff from levying more than was mentioned in his writ, and the bail, upon bringing so much into court, might obtain a rule to stay any further 1. Sid. 183. 258.

(a)

GARIBALDO *against* CAGNONI.

proceedings against them; as is done every day in case of render of the principal before the return of the second *scire facias*, though in strictness of law they ought not to do it after a *capias* returned against the principal.

HOLT, *Chief Justice*, said, that the cases differed very much; for this rule was made in imitation and pursuance of the law, and they ought not to make any construction contrary to it, and the words of it were, that the bail should be looked upon as none *in istâ actione*: and to render before return of the second *scire facias*, that was so by the ancient course and practice of the court.

But then IT WAS FURTHER MOVED, that the bail being of *Hilary Term* could not be looked upon as bail to the writ returnable in *Michaelmas Term*, and then the case would be no more than if one had by consent, upon a good consideration, put in special bail in a general action of assault and battery, in which case there would be no pretence of a surprize on the bail, and therefore they ought to answer the whole condemnation.

THE COURT inclined to this; but being informed there was never any other writ taken out,

CLERK, *the Secondary*, informed the Court, that the filing of bail without a writ taken out before or after, was void:

Which HOLT, *Chief Justice*, and GOULD, *Justice*, affirmed to be true.

But THE OTHER CLERKS all said, that the rule was understood thus, *viz.* that if bail were filed by consent, and no writ already taken out, nor taken out within eight days after, the bail was void, that is to say, the defendant was not thereby obliged to accept of a declaration; but if he did accept one, it would be well; and this seemed a reasonable explication.

At last the whole was referred to MR. CLERK to examine. *Quære quid inde venit.*

HOLT, *Chief Justice*, wished the attornies to beware of charging extravagant *ac etiams*, for otherwise an action on the case would lie for holding to excessive bail.

1. Sid. 1 12. Mod. 273.

NOTE LIKEWISE, the same point, in regard to a recovery above the *ac etiam*, came in question afterwards this Term in the case of *Bovey v. Wheeler*.

HOLT, *Chief Justice*, then said, that the above-mentioned rule was made to rectify an extraordinary practice in this court; which [268] was, If a * man became bound for another in an action of ten pounds, he was thereby bail in all actions of the same Term, by the same plaintiff against that defendant, let the sum be ever so great, which was mighty inconvenient.

And

CARIBALDO *against* CAGNONI

And this rule was made in pursuance of the statute of 13. *Car.* 2. c. 2. that the bail might know what they undertook for (*a*).

(*a*) In the case of Welch *v.* York it was agreed to be settled by the Court, that the bail was liable to all actions for *a less sum* than that mentioned in the declaration, but not to any action for *a greater sum*, 3. Keb. 16. But the practice upon this point seems now to be settled by the case of *Martin v. Moor*: the sum sworn to was 80l.; the plaintiff recovered 104l.; and the Court resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound, let the plaintiff's demand be ever so great, so, on the other hand, there was no reason the plaintiff should suffer by his moderation in taking bail, and therefore that the recognizance should be considered as an agreement to pay the *sum sworn to*, or *deliver up the defendant*, Strange, 922. By a rule also made in Easter Term 5. *Geo.* 2. where the plaintiff declares for a recovery, or greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but shall be liable for so much as is sworn to and indorsed on the process, or for any *lesser sum* which the plaintiff in *such action* shall recover, Lost, 545. But it has been determined, that the bail are liable not only to the *sum sworn to*, but to the *costs* also, Jackson *v.* Hassell, Dougl. 330. This practice, however, is confined to the court of *king's bench*; for in the court of *common pleas*, bail to the sheriff are liable, *beyond the sum sworn to and costs*, to satisfy the whole debt due to the full extent of *the penalty* of the bail-bond, Mitchel *v.* Gibbons, 1. H. Bl. Rep. 76.; for although the statute 12. *Geo.* 1. c. 29. directs, "That in all cases where the cause of "action shall amount to ten pounds, "AFFIDAVIT shall be made and filed of "such cause of action, and that the sums "specified in such affidavit shall be in- "dorsed on the back of the writ or "process; and for which sum so in- "dorsed the sheriff shall take bail, and "for no more;" it is decided, that the statute is directory, and that the bond may be taken in *double the sum* sworn to, Jennings *v.* Gooftree, Fort. 356.; Mail *v.* Mitchel, Pract. Reg. 67; Walker *v.* Carter, 2. Black. Rep. 816. And in both courts a defendant may be held to special bail in an action on a judgment for ten pounds for damages and *costs*, although the original debt alone was under ten pounds, Lewis *v.* Pottle, 4. Term Rep. 570.

The Queen *against* Tutchin.

Case 382.

AN INFORMATION was exhibited against *Tutchin* by THE ATTORNEY GENERAL in *Easter Term* last, for contriving, composing, and publishing, a certain seditious *libel*, intituled, "THE OBSERVATOR."

The defendant pleaded *not guilty* in *Trinity Term*, and a *venire facias* was issued out to THE SHERIFFS OF LONDON, the fact being laid there, returnable *die Lunæ post tres sept. Mich.* and the *distringas* was then awarded on THE ROLL in the common form, with the *nisi prius*, *die Sabb. post. crast. Animar.* but the *distringas*, through mistake, was *tested* the twenty-fourth of *October*, *viz.* the day after the return of the *venire facias*, and after verdict for THE QUEEN.

MOUNTAGUE moved in arrest of judgment,

FIRST, That the *venire* and *distringas* were made returnable at *a day certain*, whereas the fact arising in another county, it ought to have been at *a common day*.

In an information *ex officio*, or other proceeding originally commenced in the court of king's bench, the *venire*, *distringas*, and other *process*, though sued out into a different county from that in which the Court sits, must be returnable at *a day certain*; but in indictments, or other proceedings commenced in other courts, and removed into the king's bench by *certiorari*, the *process* must be returnable on *a common day*.— S. C. ante, 164. S. C. Holt, 424. S. C. 5. St. Tr. 532. S. C. 2. Ld. Ray. 1061. 1. Danv. Abr. 335. Cro. Eliz. 820. Skin. 42. 253. 1. Lev. 2. 143. Carth 70. 76. 157. 172. 12 Mod. 39. 248. 3. Com. Dig. "Enquest" (C. 6.).

HOLT,

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HOLT, *Chief Justice*. In case of *information*, or other proceeding originally commenced in this court, the *process* may be at *a day certain*, though into another county; and so it has been lately settled here, in a case wherein we took it into consideration, and ruled it so upon the certificate of all THE CLERKS: but if an *indictment* be removed up hither by *certiorari*, and afterwards is carried down to trial, there the *process* must not be returned at *a day certain*, but at *a common day*. Besides, there is great reason it should be so here, for the *information* is exhibited on a *day certain*, and the defendant's appearance to it is so too; and he pleads to it at *a day certain*; and then why should not the process be so too? The plea is, *die Lunæ crast. Trin.* and that is certain; for *crast. Trin.* without more, is a common day. Indeed, in the common pleas, except it be where they proceed to *bill* or *in assize*, they must go by *common days*. And even in this court, in *assize*, we may go by *a day certain*; and where one is sued here as present in court, all must be by *a day certain*: and so of proceedings *by bill* in any county of *England*. And since THE ATTORNEY GENERAL, by reason of the universal jurisdiction of this court, may file a bill here for a crime committed in any county of *England*, he may make the *process* returnable at *a day certain*, and he has his election of the one or the other.

The REST OF THE COURT was of the same opinion. The diffe-
* [269] rence is between things *originally begun* here, and brought hither by *certiorari*.

In an information filed *ex officio*, if the *venire facias* be returnable on *Monday* after three weeks of *St. Michael*, and the *distringas* awarded on the roll, with a *nisi prius*, on *Saturday* after the morrow of *All Souls*, but the *distringas*, through mistake, be *tested* the day after the return of the *venire facias*, it is a *discontinuance of process*; but although, being a criminal case, it is not within the *statutes of Jeofails*, yet it may, after verdict, be amended at *common law*.—4. Burr. 2570. 2. Hawk. P. C. ch. 25. f. 97. ch. 27. f. 109.

* SECONDLY, That though the *distringas* was well awarded on THE ROLL, on the day of the return of the *venire*, which was the day for both parties in court, yet the issuing a *distringas* the day after, and *tested* the day after, was without warrant, as not being according to the award of the court; for by the *statute of Nisi Prius*, the process of *nisi prius* is to be awarded *in præsentiâ partium*, and it ought to bear *teste* on the same day, or else it is a *discontinuance*.

POWYS, *Serjeant*, answered, that this was amendable even at common law, being a bare misprision of the clerk, he having a good warrant before him to guide himself by, *viz.* the award of the *distringas* on THE ROLL, by which a day was given duly to the parties, a day of *nisi prius*. And for amendments at common law, before 14. *Edw.* 3. c. 6. which is the first statute of amendment, the authority of 8. *Co.* 156. *b.* was urged by him. Want of entry of *a continuance* amended, and so of *mis-entry of essoin* by a clerk (*a*). A *discontinuance* amended, and that must have been by common law; for the statute of 14. *Edw.* 3. c. 6. is only for amendments of *a letter* or *a syllable*, and the Judges were so scrupulous, that they doubted whether they could amend *a word* by it (*b*). In the reign of *Henry the Sixth* a writ of *habeas corpus* was amended (*c*).

(*a*) Year Book 22. *Edw.* 3. c. 10.
(*b*) Year Book 29. *Edw.* 3. pl. 32.
(*c*) Year Book 4. *Hen.* 6. pl. 16. Bro. Abr. "Amendment," 32.

And

And the Book ſays, that ſuch amendments may be, eſpecially in caſe of the king *(a)*. It is true, people of late have conceited, that nothing is amendable in *criminal proceedings*, becauſe, ſay they, they are excepted out of the ſtatute, as if nothing were amendable at common law; but in many caſes at common law, the king could amend where the ſubject could not; as if *quare impedit*, at the king's ſuit, be "*præſentere*" inſtead of "*præſentare*," it is amendable, though in an *original*: but beſides, this is a matter within the expreſs words of the ſtatute of 8. *Hen.* 6. c. 12. ſ. 1. This is all in the ſame Term: while THE RECORD is wholly in the breaſt of the Court, and is relative to matter of the ſame Term; and I know nothing but what is amendable in the ſame Term; for in 8. *Co.* 156. *b.* it is ſaid, that at common law the Judges may amend their judgment, as well as any other part of the record in the ſame Term; and we are upon a miſpriſion of an officer of the court, who is to make up his record, or iſſue proceſs according to the act of the Court, which is right, and which he had before him, and that in the very Term in which it is committed. We are not endeavouring to amend the *teſte* of *an original writ* which comes out of another court, but the *teſte* of *a judicial writ*, according to the award of the Court; and no ſtatute of amendment is againſt us in this. The words of 8. *Hen.* 6. c. 12. are very comprehenſive, and would take in all *criminal matters* whatſoever, as well as *civil*, if there had been no exception in it; otherwiſe the exception had been vain; therefore what is not forepriſed by the exception, is within the general words of the ſtatute; and the exception expreſſes only * "*indictments* and *appeals* of *treaſon* or *felony*, and "*outlawries* of the ſame:" and the ſtatute of 14. *Edw.* 3. c. 6. makes no diſtinction between criminal and civil cauſes. It may be the ſtatute of 32. *Hen.* 8. c. 1. does not extend to any pleas of the crown, becauſe it mentions party and party, which in decency cannot be applied to the king *(b)*. And he relied very much on *Harris's Caſe* *(c)*; which was an indictment for a nuiſance at the ſeſſions, and *not guilty* pleaded, and the *clerk of aſſize*, who ought to have joined iſſue for the king, omitted it, and the matter being tried and found againſt the defendant, this was moved in arreſt of judgment, and yet, after ſeveral years, the Court ordered it to be amended. In the caſe of *Parker v. Curzon* *(d)*, an information for recuſancy was filed againſt huſband and wife, for the recuſancy of the wife, and the entry was, "*et præd.* the BARON and FEME *veniunt*; *et præd.* the FEME *dicit quod ipſa non eſt inde culpabilis*; *et de hoc ponit ſe ſuper patriam*;" and this was likewiſe amended after verdict by the docket of the officer, it being a manifeſt miſpriſion of the clerk; and yet this was a clear *diſcontinuance*, for there was no plea, and this amendment was in another Term. In *Sir John Aſhley's Caſe* *(e)*, in a *quo warranto* the defendant diſclaimed ſpecially, that is, the diſclaimer in *the paper-book* was ſo, and the entry on

Poſt. 287.

(a) Fitz. Abr. "Amendment," 9. 12.
(b) 2. Hawk. P. C. ch. 23. ſ. 129.
(c) Cro. Jac. 502.
(d) Cro. Jac. 529.
(e) Cro. Car. 144.

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THE ROLL was of a disclaimer general, and a year afterwards this was amended, as the Court said, at common law, being only misprision of the clerk in copying *the paper-book* before him, which was right (*a*). Upon an indictment, the *venire facias* was directed *vicecomitibus Cantuar.* and the return was only by one, there being in truth but one *sheriff of Canterbury*, and this was set right (*b*), by making an entry on the back that there was but one sheriff; and this was said to be an amendment at common law, without the help of any statute, and likewise that it might well be by the statute of 8. *Hen.* 6. c. 12 which does not extend to *informations* at all, or, if to any, not to informations at common law, as this is: so he concluded, that this was amendable at common law, being in the king's case; or if not for that, yet that it might be by reason of misprision of the clerk in the same Term; or if neither, that it was within the purview of 8. *Hen.* 6. c. 12. and not foreprised by the exception.

Post. 272. 306.

THE ATTORNEY GENERAL *ad idem*. This is a case of great concern; for if none of the statutes of *Amendments* or *Jeofails* extend to cases of THE CROWN, certainly it imports much to know what is amendable in crown cases by common law. The preamble of 32. *Hen.* 8. c. 3. takes notice of the inconvenience of having judgment stayed upon such nice exceptions; and he agreed, that statute could not be thought to extend to crown causes, because of the words "demandant and tenant" in the statute; but from that he inferred, that the crown causes did not stand in need of it; for it would sound very harsh for the subject's causes to be taken care of, and that the king's case, in matters of equal mischief, should pass unregarded. The law gives great privileges and prerogatives to suits of the king which the subject has not :
[271] a demurrer to * evidence shall not be in the case of the queen, without the consent of her Counsel; otherwise in the case of a subject (*c*). The queen after demurrer joined may waive it, and come to
1. Cro. 347. issue (*d*). Before judgment, in the queen's case, no *discontinuance*
1. Vent. 17. 28. can vitiate (*e*); nor can discontinuance be alledged before judgment, for until then, even in the case of a subject, it may be amended at the pleasure of the Court; but not after judgment in another Term (*f*). Want of form in the king's writ shall be amended, otherwise in the case of a subject (*g*). An original at common law is amendable in the king's case, but not in the case of a subject (*h*). And this is further manifest by every day's experience; for the queen shall amend her information before issue joined, and this she may do even in informations for perjury, which is a most infamous crime; and this by common right of the crown at common law (*i*), and more than a subject can do in his action. Such amendments

(*a*) Now by 9. *Anne*, c. 20. s. 7. the statute for the amendment of the law, and all the statutes of Jeofails, are extended to informations in the nature of *quo warranto*.

(*b*) 1. Sid. 244.

(*c*)

(*d*) 5. Co.

(*e*) Hardres, 504.

(*f*) Cro. Jac. 211.

(*g*) Year Book 4. *Hen.* 6. pl. 18. Fitz. Abr. "Amendment," pl. 22.

(*h*) 8. Co. 156.

(*i*) See Rex *v.* Wilkes, 4. Burr. 2569. and Rex *v.* Holland, 4. Term Rep. 457.

as

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as we press for were always allowed, where it could not turn to the prejudice of the party. But he agreed, that an amendment which would alter the defence of the party, or any way turn to his prejudice, ought not to be; but said, that this is no such, for the party had a right day on THE ROLL, and appeared and took his trial at that day (*a*). A *capias* is amendable in the king's case, because it is no prejudice to the party; but an *exigent* is not, because he would be thereby prejudiced, *viz.* outlawed; but this case stands clear of all exceptions of prejudice. Then as to THE EXCEPTION itself: Though it may seem by the award on THE ROLL that *the writ* ought to bear *teste* the same day, yet there appears no reason to make it absolutely necessary that it should be so, and there are no authorities that the law requires it. And by the reason of the thing it seems it may be otherwise; for the *venire facias* is returnable all the twenty-third, and may be returned at any time on that day, and the Court may sit all that day, and peradventure the clerk has not time enough after the award to make out a writ until the next day, and if so, they ought to *teste* it according to the truth the next day. It is true, there is reason that it should be made out and *tested* in a reasonable time after, that the jury may have time to appear, and the party timely notice to prepare for his trial; but not that it should be absolutely necessary it should be *tested* on the return of the *venire facias* (*b*). Upon a writ of error brought, if the plaintiff do not assign error, and sue out a *scire facias* against the defendant, *ad audiendum errores*, of the same Term of which the record is, all is *discontinued*, but it is not said, that he must do it at the return of the writ (*c*). All that is necessary at the return of the writ is, that the same day be given to the jury and parties, but not that the process against the jury be *tested* on that day (*d*). A *habeas corpora juratorum* shall have the same day that the parties have, that is, it shall be continued to that day; but the *teste* need not be on that day. The jury and party are continued over to a day certain by the award on THE ROLL; * and I do not know any case that makes it necessary that the *teste* should be on the same day with the *return* of the first writ, but that in *Yelv.* 204. and in *Cro. Jac.* 203. and that is in an appeal which is upon another reason; for in an appeal, if there be any mean time between *the return* of one process and the *teste* of another, as in that case there were seven days, all the process is discontinued; but that is upon a special reason, that of being in appeal, where the proceedings have always been very strict, and by the common law all appeals were to be carried by fresh pursuit; and so it was until the *statute of Gloucester*, which gives them a year and a day, within which it must be brought; and in an appeal he cannot imparl; and if he do it is *a discontinuance*; and this is the only authority I can find, except in *Cro. El.* 572. where it is taken notice of that the process bore *teste* on the day after the return of the *venire facias*, and the exception is taken to other matter on the record,

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Vide Cro. El. 453. 572.

(*a*) Year Book 20. *Hen.* 6. pl. 18.

(*b*) Fitz N. B. 20. Brook's Abr. "Discontinuance," 59.

(*c*) Year Book 22. *Edw.* 4. pl. 20.

(*d*) Vide Brook. Abr. "Discon. de Process," pl. 53.

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record, yet this was not mentioned as a fault, or amended. Besides, the course of THE CROWN OFFICE has gone sometimes this way and sometimes another way, and due weight will be laid upon the course of a court. However, if it be amiss it ought to be set right, and that by the course of the common law, without the help of any statute; for it is the misprision of the clerk of the court, which in strictness is the act of the Court in the same Term, and by consequence within the power of the Court. And besides, the crown without doubt has the benefit of the *statute of Amendments* in many cases, and great authorities are so: the statute 14. *Edw.* 3. c. 6. has no exclusive words in it, and I see no reason why it should not extend to crown causes, for there is nothing in the statute that may lead to such a construction. The statute of 32. *Hen.* 8. c. 1. I agree, does not extend to it, for the reason before mentioned; but that of 16. & 17. *Car.* 2. c. 8. is very general and extensive, without any thing in it to exclude crown causes; and the general words of the statute of 36. *Edw.* 3. c. 15. for entry of pleas in *Latin*, and pleading in *English*, extends to pleas of the crown, therefore *a pari*: and my LORD HALE, for whose opinion all professors of the law have a great veneration, was of opinion in my *Lord Fitz-Walter's Case* of a *quo warranto*, that where the writ issued to sheriffs, there being but one, that mistake was amendable by the statute of 16. & 17. *Car.* 2. c. 8. It is true, it went off upon another point, *viz.* that it appeared the jury had thrown dice for their verdict; but upon several motions, HALE abided by his opinion, that it was amendable. The case of *King v. Read (a)*, and *Blackmore's Case (b)*, throughout are, that in all cases where the words of the statute are not "between party and party," the general words will reach to crown causes if they be not excepted, and this is not excepted by the statute of 8. *Hen.* 6. c. 12. the words whereof are as comprehensive and express as can be for us: that statute indeed does not extend to all pleas of the crown, as to appeals, indictments of treason or felony, and process thereupon, because they are excepted by express words; but to all other it does. * In *Dyer*, 346, 347. an information is amended in a stronger case than this: It was in an information *qui tam* for usury, and the party brought in by *subpœna*, and appeared by attorney, and pleaded not guilty; and this taken for an exception, and yet, after debate, judgment was given for the plaintiff "*propter stat. de Jeof.*" as the Book says. Much of the common course of this court seems to be upon this ground and reason, that pleas of the crown are amendable either by common law, or by the statute, as the practice of amending records removed by *certiorari* by THE ROLL below. But in this case, taking it for granted that the *distringas* ought to bear *teste* on the return of the *venire facias*, What do we desire to amend? Only *a letter*, or *a syllable*, or rather *a tittle*; for the date is in *Latin* figures "XXIIII." and to strike out the last stroke is what we desire; a thing within the express words of 14. *Edw.* 3. c. 6. in the case of a subject; and the statute makes no difference between that and cases of the crown. Greater amendments than this have been

1. Cro. 526.

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10. Edw. 3. 2 c.

1. Sid. 148. 259.

(a) 1. Sid. 49. 66. 217. (b) 8. Co. 153.

at

at the common law; and *Lord Coke* says, that of late days, without doubt there were amendments at common law. We put it upon the other side to shew, that there was any diversity between crown causes and those of subjects, except it were that crown causes were amended where subjects' causes could not be; and if they do not shew any such authority, then all the authorities for amendments in civil causes are *à fortiori* in criminal causes. *Lord Coke* says, that at common law a variance in any part of the record from the original is amendable; so the Judges may amend their own judgment, as also any part of the record in the same Term, but a misprision of the clerk in process was not amendable in another Term; so it was his opinion, that it could be done at any time in the same Term; but he might go a little further, and say, it might be at any time before judgment; for all the old books are so. Now the reason of that rule extends to all criminal causes as well as civil. If a fine be set in court on the first day of Term, it may, by common law, be mitigated or discharged at any time during the Term. In *Trinity Term*, in the seventh year of *William the Third*, in the case of *The King v. Walcott*, a writ of error was brought to reverse an attainder of treason, and a necessary part of the judgment being omitted, the reversal was actually pronounced and entered on the roll; but the Court finding that there were precedents and forms of entries to the contrary, they ordered the judgment to be struck out again the same Term, and to be put in the paper to be argued; and the process of the court, as well as their judgment, is in the breast of the Court all the same Term. A second instance of this practice is, that all misprisions of the *clerk of assize*, or *justices of peace*, in certifying the indictment in the caption, may be amended the same Term it comes in. If an indictment be vicious in the caption, the Court by common law may amend it the same Term it comes in, 1. *Sid.* 259. *The King v. Glover.* The coroner was ordered to attend, and to amend an inquisition returned hither, *Cro. Car.* 276. An indictment upon the statute of 8. *Hen.* 6. c. 9. of Forcible Entries, laid the inquisition to have been taken * *apud* S. *coram* A. *et* B. *justiciar. pacis in partibus præd.*; and there being three divisions in the county, and three several commissions for them, exception was taken that it did not appear for which of them "*A.* and *B.*" were justices; and this was held a fatal exception. But it has been ruled (*a*), that if the certificate of the clerk of assize be faulty by his misprision, they will amend it by the roll below. In *Samson's Case (b)*, Error was brought to reverse an indictment of murder; the certificate of the clerk of assize was wrong, for want of a continuance; and one of the Judges would have it amended at common law, for the great mischief that would otherwise ensue; but JONES, *Justice*, was against it, except the king did specially desire it.

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8. Co. 56.

8. Co. 56.

Vide 1. Vent. 132. in another Term.

1. Cro. 251. 1. Vent. 69. Raym. 186. 4. Mod. 395. Parliam. Cases, 125.

1. Saund. 208.

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(*a*) Stafford's Case, 1. Jones.

(*b*) 1. Roll. Abr. 196.

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And *per* HOLT, *Chief Justice*, That must be by *special mandate*.

But there two Judges were against JONES, *Justice*, for its being amended. An amendment was made of an indictment, according to a precedent in *Edward the Fourth's* time (*a*). Before the statute of Amendments, civil and criminal matters were amended. He quoted the Year Book of *Edward the Third* (*b*), where an entry of essoin was amended (*c*). An entry of voucher to warranty has been amended (*d*). The record of a judgment is in the breast of the Court all the same Term (*e*), and all process until judgment (*f*). Default of process is amendable at any time before judgment (*g*). After issue joined, there was a *distringas*, and no award of *tales* on the roll, and there being a *tales* on the back of the writ, it was amended (*h*). The record was, that such a one, "*gentleman*," and in the NISI PRIUS ROLL, "*gentleman*" was omitted, and it was amended, and all by the common law (*i*). In the case of *Bond v. Devys* (*k*), on the *venire facias*, *S. Sutton* was returned, and the *distringas* was so, but the panel returned was *D. Sutton*, and that *variance* was moved in arrest of judgment; but upon examination, it was found to be only a misprision of the sheriff's clerk, and therefore amendable by common law, without the aid of the statute of 8. *Hen.* 6. c. 12. In trespass (*l*) to the damage of one hundred pounds, the record of *nisi prius* was one hundred shillings, and there was a verdict for a hundred pounds; and this mistake was amended as a misprision of the clerk, and there the Judge of *nisi prius* had no more warrant to try that issue than is in our case. In *Brooke* (*m*) and *Fitzherbert* (*n*) are amendments, all at common law. Things of the same nature with this were amended at common law (*o*); and the statute makes no alteration against us, but where it is expressly so (*p*). There are not in THE YEAR BOOKS many instances of criminal proceedings, and that is a great argument that these niceties have not crept into the law in criminal matters; for if they had, something of them would be found. Then if there were amendments at common law, why shall there not be some in informations? There are multitudes of amendments of this nature in civil cases. The case of *Tufton v. Ashley* (*q*), is of an amendment at common law even in another Term, which could be, as is there held; and sure it is in the power of the Court to do right to THE QUEEN, as well as to THE SUBJECT. And he quoted my

7. *Edw.* 4. 15.

Skinner, 46, &c.

(*a*) 7. *Edw.* 4. pl. 15. Palm. 480.
(*b*) 4. *Edw.* 3. pl. 9. b
(*c*) Year Book 5 *Edw.* 3. pl. 25.
(*d*) 3. *Lev.* 427.
(*e*) See 1. Bac. Abr. 89.
(*f*) Year Book 9. *Edw.* 4. pl. 3. Abridg. by Brooke, "Amendment," 46.
(*g*) Year Book 7. *Hen.* 6. pl. 27.
(*h*) Fitz. Abr. "Amendment," 32. Brook. Abr. "Discontinuance," 15. 13. Fitz. Abr. "Amendment," 13. 65. 16, 17. The Year Book 22 *Edw.* 3. pl. 19. Brook. Abr. "Amendment," 105.
(*i*)
(*k*) Cro. Car. 563.
(*l*) Fitz Abr. "Amendment," 16, 17. Bro. Abr. "Amendment," 17.
(*m*) Bro. Abr. "Amendment," 26. 29.
(*n*) Fitz. Abr. "Amendment," 16. 55.
(*o*) Year Book 2. *Rich.* 3. pl. 11. Bro. Abr. "Amendment," 87.
(*p*) Bro. Abr. "Amendment," 22. 59.
(*q*) Cro. Car. 144.

Lord

* *Lord Macclesfield's Case* (*a*): A rule was made to reverſe an attainder of high treaſon, about ſixteen years before, upon writ of error, and no entry thereof, or any record made up, no continuance or aſſignment of error, and yet, to reverſe this attainder, leave was given to make up the record now (*b*); and if this help was given to a ſubject, Why ſhould not the like be in the queen's caſe (*c*)? And there it was ſaid to be a default in the officer of the court, and that was in ſome reſpect the default of the Court; therefore he was ordered to do that now which then he ought to have done: ſo here it is to make your officer do what he ought to have done before. The caſe of *The Queen v. the Warden of the Fleet* (*d*) was much ſtronger than this; for there a *venire facias*, upon iſſue joined in chancery, was returned hither the fourth of *February*, and the record itſelf did not come in until the ſeventh, and the officer marked it to have come in on the very day on which it came in truth, and the Court ordered the matter of fact to be examined, in order, that if it ſhould appear that the record had come in on the fourth, it ſhould be ſet right, but it appearing not to have come in until the ſeventh, they could not amend it, being a diſcontinuance, but upon writ of error before the lords, that judgment was reverſed for this reaſon, for that the clerk might have entered it as of the fourth, though in truth it came in after.

But HOLT, *Chief Juſtice*, ſaid, that matter was not ſet right in the king's bench to this day; for they looked upon it to be againſt their duty as Judges to enter a record againſt truth.

LASTLY,—THE ATTORNEY GENERAL ſaid, that the making a writ different from THE ROLL was only the miſpriſion of the clerk (*e*).

BROTHERICK *contra*, firſt, took a difference between the ſuit of the king in a civil proſecution of his right, and a proſecution againſt a ſubject for a crime. In the firſt caſe, he has greater favour than the ſubject; in the other, the ſtricteſt nicety is to be kept to. Upon this difference he diſtinguiſhed the caſe of *quo warranto* from the preſent caſe, as likewiſe that of the *Warden of the Fleet*; for they are to be looked on as proſecutions for the king's civil right. He agreed, that there were ſome amendments at the common law; but ſaid, that if there were amendments in all the inſtances put by them, there would be little uſe of the *ſtatute of Jeofails* or of *Amendments*. He denied that any criminal proceedings were amendable by the ſtatute of 8. *Hen.* 6. c. 12. or the 16. & 17. *Car.* 2. c. 2.; and no authority of any ſuch amendments is quoted, except in *Dyer* (*f*); and *Roll* (*g*) takes notice of the caſe in *Dyer*, and ſays, it was held not amendable in the twenty-ſecond year of *Queen Elizabeth*. And *Coke*, in the middle of *Blackmore's Caſe*, ſays, that the ſtatute

(*a*) 1. Ld. Raym. 16.
(*b*) See Lord Mohun's Caſe, ante.
(*c*) See Wilkes' Caſe, 4. Burr. 2569.
(*d*) 3. Mod. 335.
(*e*) See Cro. Eliz. 467. 1. Roll. Abr. 200. that teſte out of Term, or on a *Sunday*, is the fault of the clerk.
(*f*) Dyer, 316
(*g*) 1. Roll. Rep. 447.

did

did not extend to criminal proceedings. *Cro. Car.* 312. says, that the *statute of Jeofails* does not extend to pleas of the crown. A wrong *venue* is fatal in a *quo warranto*, *Style*, 307. In a suit * upon the *statute of Inmates*, a *distringas* bore *teste* out of Term, and it was not amended; and a *venire facias de novo* was awarded. See also 3. *Keb.* 485. the opinion of HALE, so much relied on of the other side. In 1. *Vent.* 17. 35. an information for forgery at common law was denied to be amended. In *Hardres*, 217. an information was brought upon the *statute of Navigation*, for importing certain spices of the growth of *Asia*, *Africa*, or *America*, from *Holland* beyond the seas, and an exception was taken, that it was not said that *Holland* was not in *Asia*, *Africa*, or *America*, and held fatal, though after verdict. He agreed, that records which come hither by *certiorari*, if variant from THE ROLL below, shall be amended by it. The case of the writ directed to two sheriffs when there was but one, was amended by having an indorsement made on the back of the writ that there was but one sheriff in fact; and it was an amendment by the common law, according to a precedent in 5. *Hen.* 7. where a writ was directed *coronatoribus* (*a*). But it is said, that there is no necessity it should be *tested* on the day of the return of *venire facias*; but that is expressly against the case in *Yelverton* before put. This is not like the *Case of Walker* (*b*); for that was an alteration of the judgment of the Court, which is not complete until the last day of Term; nor is it like my *Lord Macclesfield's Case* (*c*), for doubtless the Court may supply lost records, or put things in the state they have been in before, or make their officer do that which he ought to have done; but this is to alter what he has done. A *venire facias* returnable at a day different from the award of the Court, and trial thereupon, is not amendable (*d*). An information was brought on a penal statute, and the *venire facias* on the roll awarded was "*coram nobis ubicunq.*" and that *venire facias* made out was "*coram nobis*," without more; and judgment stayed thereupon (*e*).

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HOLT, *Chief Justice.* The case of the *Warden of the Fleet* was a civil action, and no criminal prosecution; but merely a civil course to entitle the king to an office forfeited to him.

See Carth. 70. 76. 157. 172, &c. Skinner. 46. 253. &c. 11. Mod. 230. 233.

MOUNTAGUE having had time given him to answer, argued it solemnly.—This point, as it is of concern to THE CROWN, so it is of high importance to THE SUBJECT; for it is to make a precedent that will be leading in the like cases. Again, actions *qui tam*, which in some respects are between subject and subject, have been always excepted out of the *statute of Jeofails*; therefore, *à fortiori*, actions of higher nature are so. The *teste* of this writ is not amendable at common law; though I agree many amendments were at common law. No authority has been quoted that error in the *teste* of a writ is amendable at common law.

(*a*) 1. Keb. 900, 901.
(*b*)
(*c*) 1. Ld. Ray. 16.
(*d*) By POPHAM, *Chief Justice*, in the case of Rogers *v.* Bird, Cro. Eliz. 572.
(*e*) 1. Roll. Abr. 201. Yelv. 60.

Lord

Lord Coke (*a*) says, that Judges may amend their own judgment in the same Term, or any other part of the record; but it does not from thence follow, neither does he say, that they may amend faults in writs issued * out of their record to an officer *in pais*, or returns made by him. And the reason why they may amend their own judgments and continuances, which are the only instances given there, is, because they are their own proper acts, which, as it is there said by my *Lord Coke*, remain in their breasts in the same Term; but the act of another in pursuance of their award cannot be said to be their act, and a writ made out to an officer cannot be said to be in the breast of the Court. If the entry of the clerk of the award of the Court had been different, there might be some colour to amend THE ROLL; but this is not so: you will take notice that the writ ought to be according to your award, and that it is not so is the fault of the officer, not of the Court. All their authorities out of THE YEAR BOOKS are between party and party, and not like this; nor within the statute; the words of 14. *Edw.* 3. c. 6. are very large, and yet there is not one authority of amendment of crown causes by that statute: and *Coke* (*b*) holds, that the statute does not extend to pleas of the crown; and this he says generally, without saying that it is because they are excepted, as he says, upon the statute of 8. *Hen.* 6. c. 12. in that case; and this statute of 14. *Edw.* 3. c. 6. has no exception; and yet by the opinion of that Book, the words of it do not comprehend pleas of the crown: and what can be the reason that the general words of this statute do not extend to pleas of the crown, as it has been acquiesced in ever since, but the great indulgence that is given to the subject in criminal matters? It may be objected, that the crown's not being relieved by the statute, is a sign [illegible] it did not want it. In the case of *Beecher v. Shirley* (*c*) it is held, that there can be no *discontinuance* in crown causes until judgm[illegible]; but those cases extend only to what we agree, that the acts of the Court are in their breast before judgment; and so is 3. *Lev.* 430. and COKE's *Note*, that the statute did not extend to pleas of the crown, would be impertinent, if that were so that they did not need it. As to the statute of 8. *Hen.* 6 c. 12. which has an exception of "appeals, of indictments of treason and felony, and outlawries on "the same," from whence it is strongly urged, that it extends to our case, because it is not excepted; I answer, First, That the words of it are not more comprehensive than those of 14. *Edw.* 3. c. 6.; that of 8. *Hen.* 6. c. 12. is all misprision of clerk in *writ*, the other is all misprision in *process*, so they are co-extensive, and the exception, we say, is only *ex abundanti cautelâ* of some scrupulous law-maker, or but mentioned for instances to shew they meant not it should extend to pleas of the crown. Many estates-tail are not mentioned in the particulars instanced by the statute *de Donis*; and so are many offices not within the enumeration of particulars

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(*a*) 8. Co. 156. c 157. a.
(*b*) 8. Co 57. b.
(*c*) Cro Jac. 2[illegible] — See also Hardres, 5[illegible]4.

in

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in the statute of 5. & 6. *Edw.* 6. c. 16. against selling of offices: so since the proceedings of all the time, ever since the making of these, have gone against the notion of amending of crown causes, it will be hard to begin now. * And this *variance* of THE ROLL from the *teste* cannot be thought the slip of the clerk. Indeed, if the day certain on which the writ ought to bear *teste* were entered on THE ROLL, then it might be a misprision of the clerk not to imitate what was set before him; but that being not so, it was the nescience of the clerk that he did not know, but it would do well to have it *tested* at any subsequent time; and faults through nescience of the clerk are not amendable. Amendments here would quite alter the writ, and make it quite another writ, as much as the twenty-fourth differs from the twenty-third; and that such amendment would be like the alteration made by *Justice Ingram*, whereof mention is made in 2. *Ro.* 3. 10. *a.* for which he was fined eight hundred marks.

Vide post. 286. * *pede.*

But PER CURIAM, That alteration was made extra-judicially and clandestinely, and that made the crime of it.

250. And HE relied on *Gage's Case* in *Co. Entries* and in *More*, and *Child v. Harvey*, *Mich.* 11. *Will.* 3. where, on a *scire facias* upon a record out of chancery, issue was joined, and a *nisi prius* was on the very day of the return of the writ.

But PER CURIAM, That could not be set right, because the trial was actually had before the return of the writ.

And HE quoted the opinion of *Noy*, in *Cro. Car.* 144. that none of the statutes extended to the king's case.

PARKER *on the same side.* As to records removed hither by *certiorari* the same Term they come in, to have them amended, the truth is so; for when a record is removed hither by *certiorari*, by intendment of law the very record is brought hither; but if it appear to the Court not to be rightly entered, they will do it, because all the Term it is in their breast: but it is not like writs issuing out and coming in the same Term, for there it is otherwise; for as to records coming by *certiorari*, the Term is but one day, and the Court are not absolutely possessed of it until that day be out; but as to writs, the Term has several returns and days in it. Here the fact is, that the writ was really made out at a day after the twenty-third, and *tested* according to the truth on that day; and to make it *tested* against this, would be to go against the truth. And we say, that the writ ought in law to appear to have been made out *in præsentiâ partium*; and the command of the Court is not by the entry on THE ROLL, but by the writ. If indeed it had been made out at a day after, and *tested* of the return of the *venue*, it would have been intended to have been well, and made out at the time it bears *teste*. And he said, the difference in crown causes was between a suit for the king's civil right, which is favoured, and criminal prosecutions, which are *stricti juris*. He took another diversity, in point of amendment of writs on which nothing is

done,

done, and writs executed; as if on a *capias* nothing be done, but *non est inventus* returned, that may be amended, when if the party were taken upon it it would be otherwise; and for this diversity he relied on the opinion of POPHAM, in the case of *Rogers v. Bird* (*a*), a *venire facias* was rightly awarded, and made out (through mistake) wrong, and *per* POPHAM, if a trial had been upon it, it should * not be amended. *Vide* 34. *Hen*. 6. 2. *Br*. "*Am.*" *pl*. 10. 3. If a juror be returned upon a *habeas corpora* different from *venire facias*, it is not amendable. And there is another diversity where the thing is really done well; as if the *venire facias* be of one person, and he is really sworn, but by another name, this is amendable. *Vide* 28. *Hen*. 6. 3. 2. *Sid*. 12. *Palm*. 490. 1. *Ro*. *Ab*. 196.

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POWYS, *Serjeant*, *by way of replication*. As to diversity between the king's civil right and criminal prosecution, they quote no case where it is taken; and if the king have that great favour in the prosecution of his civil right, for that it concerns the revenues of the crown, in which the public have an interest, *à fortiori* it ought to be in prosecutions for crimes which is for the administration of justice, and in which the subject, *viz*. the public, have the highest concern that they should not go unpunished, especially where the offender loses no legal advantage, nor receives any real prejudice by it. It is admitted, that all acts of the Court, even the highest and most transcendent, are amendable in the same Term; *à fortiori* then should the slip of a clerk in pursuing the warrant of the Court be so too, that likewise being a matter no way prejudicial to the offender. If a writ original, when a fault is discovered therein, shall be sent into chancery, to have this mistake of a clerk there amended by that court, Why shall not this Court in like manner amend the mistake of their clerk in a writ issuing out here? Great endeavours have been used to exclude this case out of the benefit of the two acts of parliament, for that the general notion has been, that those statutes do not extend to criminal causes or proceedings; but sure the opinion of my LORD VAUGHAN, in his case of *collateral warranty*, is very reasonable, "That ancient "interpretations ought to be followed; but that, on the other "hand, a thousand resolutions against the express words of an act "of parliament ought not to prevail." And the words of the statute of 8. *Hen*. 6. c. 12. are very expressive and general, "All, "&c." and the exception very particular.

Quære and *vide ib*. 170. and 327.

Vid. 1. Jo. 423, 424.

THE ATTORNEY GENERAL. Sure the diversity between civil and criminal prosecutions of the crown, as to the point of legal favour, is very groundless; for we all know, that by the common law a criminal was not to have a copy of his indictment, or Counsel to plead for him, which is now remedied in case of treason (*b*); and before, and even now in all cases of felony, the defendant has no other opportunity of defending himself but merely upon the fact, *guilty* or *not guilty*. It is odd to say, that if THE ROLL on the

(*a*) Cro. Eliz. 572.

(*b*) See 7. *Will*. 3. c. 3. and 7. *Ann*. c. 21. s. 11.

award

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award had been wrong, it might be amended as the act of the Court; and that the slip of the clerk in pursuance of the award of the Court, which is right, shall not be amended; that is, that when there is nothing to amend * by, it shall be amended, and not when there is a good foundation to amend by. It is not true to say, that there is no more reason to bring pleas of the crown within the statute of 8. *Hen.* 6. c. 12. than within that of 14. *Edw.* 3. c. 6.; for that 14. *Edw.* 3. c 6. has the word "party" in it, which may have been the reason why it has not been construed to extend to crown causes; but there is no such word in the statute of 8. *Hen.* 6. c. 12. and *Coke* seems strongly of this opinion in *Blackmore's Case* (*a*); for he says generally, "that "14. *Edw.* 4. c. 6. does not extend to crown causes;" but when he talks of that of 8. *Hen.* 6. c. 12. he says, "that statute "extends not to crown causes." Why? Because they are excepted. But it is objected, that we contend against the current opinion in all ages, and we agree it was generally taken so, though no direct authority be in the case; and there are not many authorities express, even upon the statute of *Jeofails*. And such general received opinion upon a matter never solemnly adjudged is of no great weight; for it was a common opinion ever since the making of the statute 32. *Hen.* 8. c. 34. concerning actions by assignees of a reversion, that it did not extend to an assignee of a copyholder. And though there be a case in *Yelverton* (*b*) agreeable to that opinion, yet about twelve years ago, when it came thoroughly to be considered, it was held (*c*), that that statute did extend to copyholds. Some opinions sudden, and passing *sub silentio*, ought not to be of any great consideration. I do agree that this is a case of great consequence; but what is the consequence? Whether an offender shall go unpunished? and sure criminals are not the favourites of the law. There is, indeed, favour where life is in question, but none in case of inferior offences; and it is more for the honour of justice and law that criminals should be punished, than escape upon such niceties: but however, all this must stand upon the law, and everybody is to have justice. As to 2. *Cro.* 211. where it is *obiter* said, that the *statute of Jeofails* shall not extend to the crown, except it be expressly named, that is, directly against a known and true rule in law, upon construction that general words of an act of parliament for furtherance of justice, or suppressing of wrong, shall bind the king. And in the case in *Style*, 304. which was a suit upon the statute of *Inmates*, and a *distringas tested* on *Sunday*, and the question, Whether it was amendable by 18. *Eliz.* c. 14. or 21. *Jac.* 1. c. 13.? and held not; but no mention was made of 8. *Hen.* 6. c. 12. And *Yel.* 60. was an information upon a penal statute, and the rule was of a sudden, "let judg- "ment stay;" but that is not to be understood as a final determination; and besides, that is excepted by the subsequent statutes,

Q. stat. 29. *Car.* 2. c. 3. sect 2. *i. e.* of Frauds. Post. 281.

(*a*) 8. Co. 156.

(*b*) Appleton *v.* Doyley, Yelv. 135 Brasier *v.* Beale, Yelv. 222. S. C. Cro. Jac. 305.

(*c*) 4. Mod. 80. Bull. N. P. 161. 3. Term Rep. 398.

And

And to say that this is no misprision, but forgetfulness, which is nescience, *quia omnis scientia est reminiscentia, ideo omnis ignorantia est oblivio.* We say, that all defect through want of due care or diligence is a misprision; and so is 8. *Co.* 160. *b.* if a clerk embezzle the record voluntarily, or suffer it to be defaced by accidents, or through want of care, it is a misprision. And the amendment in *Siderfin*, by suggestion on THE ROLL of a fact otherwise out of their * notice, is much more than we desire here: and a *quo warranto* is not a civil prosecution for *ouster* of the franchise; for suppose the defendant disclaim in the franchise, yet he must further answer the usurpation; and if it be found against him, he shall be fined. THE QUEEN *against* TUTCHIN. * [281]

HOLT, *Chief Justice.* The case of *Rex v. Sherrington Talbot (a)* does not come up to this case: that was an amendment for the subject, and in a civil case. And sure if in a *quo warranto* a subject make a limited *disclaimer*, and the clerk enter it a general one, this ought to be amended; and on the other side, if an original indictment be right, and the clerk enter it wrong on THE PLEA-ROLL, it shall be amended (*b*). And *Harris's Case* (*c*) is a very shrewd case. In capital matters there never is a complete issue joined, but *de hoc ponit se super patriam*, but in other criminal cases it is otherwise (*d*); and the *Case of Sir John Curzon* (*e*) is a strong case too. Indeed, this is a case of great consequence; and it has been the general received opinion, that the *statutes of Jeofails*, or *Amendments*, do not extend to pleas of the crown, and great regard is to be had to that; and it is true, at the judgment of the case in *Style*, 304. no mention was made of the statute of 8. *Hen.* 6. c. 12. and that is rather an argument that it was clearly conceived it would not help them, than that it was not thought of; for there were very learned men then at the bar: and the reason of the late judgment in the case of an action brought by the assignee of a copyholder, was founded upon the rule taken in 3. *Co.* . that the general words of an act of parliament shall extend to a copyhold estate, where it is for the benefit of the tenant, and not to the prejudice of the lord. Ante, 280.

THE COURT having taken time to consider until the last day of this Term, and THE ATTORNEY GENERAL now pressing for their resolution, they argued *seriatim* thus; after declaring that they could wish for longer time, not that they were unsettled in their opinions, but to digest and methodize their reasons to greater satisfaction.

GOULD, *Justice.* I hold it amendable at the common law; for otherwise, what mean all the amendments in indictments and informations quoted by MR. ATTORNEY? For the purpose, that of 2. *Bulst.* 35. and the case there quoted by one of the Judges:

(*a*) Cro. Car. 311.
(*b*) Cro. Car. 144.
(*c*) Cro. Jac. 502.
(*d*) See Rex *v.* Dowlin, 5. Term Rep. 313.
(*e*) Cro. Jac. 529.

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Two were indicted for felony, and found guilty; the Judge who tried them found the indictment was in the singular number, and therefore stayed the judgment; and afterwards upon consideration, by the opinion of the ten Judges, it was amended, and the men hanged; and, I say, that must have been by the common law. *Vide Raymond*, 440. And I take it, that faults which do not alter the issue or trial may be amended; and he relied on *Sir John Curson's Case* (a), and *Godfrey's Case* (b), and the case of *Sherrington Talbot* (c): and indeed, if it were not for the case of *Bradley v. Banks* (d), I should think it well enough, and a good continuance; for the twenty-third all day the defendant may be in court, and the very first minute of the twenty-fourth here is process issued out; and the case of *Bradley v. Banks*, as it is in *Cro. Jac.* (e), does not at all contradict this opinion.

[282] * POWYS, *Justice, accord.* FIRST, This is an information perfectly at common law, and not upon any penal statute. It has obtained, that the *statutes of Jeofails* extend not to any crown cases, because they have an exception of all indictments and informations upon penal statutes; and it is a common notion, that no crown matters shall be amended by any *statute of Amendment*; but it seems very odd to make such an interpretation upon the statute of 8. *Hen.* 6. c. 12. for the purview of that statute is as express and general as can be, and the exception but particular; therefore to extend it to things of an inferior nature is very wonderful to me. In the *Lord Bridgwater's Case* (f), my LORD HALE thought the statute of 8. *Hen.* 6. c. 12. was not to be so restrained; but that the exception was an excellent key to open the meaning of it, that is, to amend whatever comes within the generality of the purview, and is not excepted by it: and he was of opinion, that crown causes did want, and in many cases ought to have, the help of the *statutes of Amendments* and *Jeofails*; but the rest inclined against him. And my LORD COKE saying, "That 8. *Hen.* 6. c. 12. "extends not to informations in crown causes, because they are "excepted," and we finding upon a perusal of the statute that they are not excepted, make the reason run quite another way; and I believe such opinions as are against me have been conceived upon the credit of that saying of *Coke*, without any further examination; and though the king be not named within the purview, yet his being named within the exception shews the law-makers understood, that without the exception it would extend even to all crown causes. However, in regard to the opinions against me upon the statute, I do not go upon the statute, but hold it amendable at common law. And much, I think, may be said upon the reason of the thing, that it is very well as it is. The return is on the twenty-third, and so is the award, and the writ issues on the twenty-fourth, so that there is no interval of time or chasm be-

(a) Parker v. Curzon, Cro. Jac. 529.
(b) 1 Sid. 243
(c) Cro. Car 311
(d) Yelv. 204. 1. Bulst. 143.
(e) Cro. Jac. 283.
(f)

tween

tween the one and the other, but the minute the one leaves it the other takes it up. The words of the award are, "*Præceptum est* "*quod distringat*;" and that regards futurity, and cannot be on the twenty-third, because that would be to distrain them before any default in them; for they have all the twenty-third to appear, and the next day without interruption continues the process. As to the case of *Bradley v. Banks*, as it is in *Cro. Jac.* it does not contradict this opinion, but seems rather to favour it; for there notice is only taken of the gap between the *teste* of a *capias* and *the return of the original* in an appeal, which was seven or eight days: and though *Yelverton* says further, that *the exigent* bore *teste* the day after the return of the *capias*, which was ill, yet *Croke*, taking notice only of the great distance of time between *the return of the original* and the *teste* of the *capias*, seems as if he had conceived that the Court had grounded their opinion upon that, and that this is amendable at common law; and surely there are much bolder amendments even in capital matters. We are to consider that this is but the misprision of the clerk in process, and that in an offence of an inferior nature; and if there have been greater amendments in capitals, I think this may be well amended (*a*). * In an information for perjury, the *venire facias* was "*J. S.*" without addition, and by consequence must be *J. S.* senior, and the *distringas* was *J. S.* junior, quite another person, and it was amended (*b*), for that this is the misprision of the clerk (*c*). So this being an information at common law, and there being amendments at common law, and this being a misprision of the clerk, the award of the Court being right, I HOLD that it ought to be amended.

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POWELL, *Justice. contra.* This is a case of great consequence. THE FIRST question is, Whether this be a fault at all? THE SECOND, If it be, Whether it be amendable at common law, or by the two statutes of Amendments of 14. *Edw.* 3. c. 6. or 8. *Hen.* 6. c. 12.? for the other statutes are of *Jeofails*, and not of *Amendments*. This is *a discontinuance* at common law; for all processes must be continued from the very time of the award of the Court; and the authority of the case of *Bradley v. Banks*, and the reason of it is so. The reason is, because it is *a discontinuance*, and not because it is *an appeal*, in which there must be *fresh pursuit*, as the Judges said; but it must be because it is *a discontinuance*, in all cases at common law; *à fortiori* it will be so in an *appeal* in which *fresh pursuit* is required; and the saying of the Judges is so to be understood. It is true, THE ROLL is rightly continued, but the process to the jury is discontinued. In the reign of *Edward the Fourth* (*d*), the defendant at the day was essoined to *quinden. Pasch.* there must be an *idem dies* to the other; but that could not be given to the jury, but they must be continued by *habeas corpora*, and that on the very return of the *venire facias*; and this case is not right in *Brooke*. It is true, since the *statute of Jeofails* these things

(*a*) For instances of common law amendments, see 1. Sid. 243. 66. 1. Keb. 191. 255.

(*b*)

(*c*) 1. Roll. Abr. 201. Cro. Eliz. 572.

(*d*) Year Book 21. *Edw* 4. pl. 2c.

 have

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have not been kept up to; but at common law there muſt be a chain of proceſs againſt the jury, as well as in caſe of other continuances; and to ſay, that the *twenty-fourth* is a continuance of the *twenty-third* is what I cannot for my life comprehend, no more than that the *twenty-ſixth* can be of the *twenty-third.* Then if it can be amended by 8. *Hen.* 6. c. 12. the words whereof are very general, and the exception of few particulars of the higheſt nature; and upon full conſideration, I think it cannot; for I cannot imagine that all the Judges and ſages of the law ever ſince would rather, in caſes of this kind, rely upon the common law, than upon this ſtatute, except they had taken it clearly that the ſtatute did not reach to it; and the reaſon of that ſeems to be from the ſtatute of 14. *Edw.* 3. c. 6. the words whereof are general, but mention the word "*party*," which was a good reaſon to exclude *the king*: and of that opinion is COKE, in *Blackmore's Caſe*, VIZ. that the ſtatute extends not to pleas of the crown. It is true, the ſtatute of 14. *Edw.* 3. c. 6. extended only to proceſs out of THE ROLL, that is, writs that iſſue out of the record, and not to proceedings in the roll itſelf; and for that 8. *Hen.* 6. c. 12. was made to enlarge the remedy of 14. *Edw.* 3. c. 6. to proceſs in the plea roll, &c. which ſtatute, in my opinion, being made in enlargement of 14. *Edw.* 3. c. 6. but not as to the parties that ſhall receive the remedy, but to what

*[284] matters more that remedy * ſhall extend: and the words "challenge of party" in the ſtatute 14. *Edw.* 3. c. 6. ſhall explain the ſtatute 8. *Hen.* 6. c. 12.; and it is no new thing for one law to be conſtrued in purſuance and imitation of a former law: and thus I hold the exception in 8. *Hen.* 6. c. 12. is *ex abundanti cautela*; and that without, no plea of the crown had been within that ſtatute; and that reaſon which reaches the *ſtatute of Jeofails*, will have, I own, nothing to do with this matter. The firſt of them is that of 32. *Hen.* 8. c. 30. the words are, "between party and "party;" and ſoon after they would not extend it to proceedings between *demandant* and *vouchee*, becauſe *the vouchee* is not an original party. The exception of the ſubſequent ſtatute does not extend to *informations* at common law: and my LORD HALE, in my *Lord Bridgewater's Caſe*, held, that ſuch informations were within the purview; but I never knew any principal judgment of that kind; and I rather think that the firſt *ſtatute of Jeofails* extending only to party and party ſhall interpret all the reſt to be ſo too: and ſo it was upon the ſtatute relating to leaſes by biſhops and eccleſiaſtical perſons, for they are a chain of law relating to the ſame matter. This is a fault in the *teſte* of *a writ.* The *teſte* of *an original* is ſo material, that it is not amendable; and that was *Gage's Caſe.* And lately in a caſe in the houſe of lords, between the *Lords Pembroke and Jerſey*, the ſame was held by all the Judges; but this is the *teſte* of a judicial writ. It has been doubted, in *Cro. El.* 820. whether the *teſte* of a *venire facias* or *diſtringas* were amendable, and a difference taken by the Court between a *teſte* and *return* of thoſe writs; for there being no day named in the award of the Court for the *teſte*, and there being always

Vide ante, 4, 5. and 269. 8. Co. 156. b.

always a day certain for *the return*, the variance of the *teste* was held the nescience of the clerk, and therefore not amendable: but notwithstanding, since, they have amended the *teste* as out of Term, after the return, or on *Sunday*; but this writ here is good in itself, though not to this purpose: and yet I think if it were in a civil cause it should be amended by the award on THE ROLL, especially the clerk having declared to us upon examination, that it was the writ he intended in pursuance of THE ROLL. And there are authorities to amend the writ even when it is a good writ, but not to the purpose, to adapt it to the matter, *Yelv.* 64. So though this be not in itself a naughty writ, yet if upon examination of the clerk it appeared through mistake in him not to be *ad idem*, we would amend it by 8. *Hen* 6. c. 12. in a civil matter. But whether this be amendable at common law? There were amendments at common law, if it be called *an amendment*, that the Court could alter their judgment in the same Term, though the record of it were made up; but there though it be entered on THE ROLL, yet THE ROLL in the same Term is not *the record*, but it remains in the breast of the Judges: but in another Term THE PLEA-ROLL is *the record*. And my *Lord Coke* says, that the mistake of the clerk in process shall not be amended in another Term: but I think that must be understood of process in THE ROLL, and not of process issuing out of THE ROLL: as the case of 29. *Hen*.6. the award was with a *distringas* and an *octo tales*, and the entry of a *distringas* generally, and * all this being in the same Term, the Court said, This is a mistake of the clerks, for we remember that we have awarded a *distringas* with an *octo tales*, and order an amendment: but the making out a process out of THE ROLL is otherwise; for it never was otherwise in the breast of the Court, than that they awarded it; and the clerk's wrong pursuing their the award in making out a writ with an ill *teste*, though in the same Term, is not amendable; nor do I find any case at common law where the amendments were of mistakes of the clerk in issuing of process, but their mistakes in entering the acts of the Court, or of the Court in entering *continuances*, may be amended the same Term, or at any time after; and so is the case of *Chambers v. More*, now in *Levinz* (*a*). And as to amendments of *criminal matters* at common law, I cannot agree with many of them, as *Harris's Case* (*b*) for one; so of the case in *Palmer* (*c*), *Plomb's Case*, where they supplied *ad com. meum* in an outlawry, for we every day reverse outlawries for that fault; and the case cited by YELVERTON, in *Bulstrode* (*d*), is so shortly put, that it does not appear in what the singular number is put for the plural; but if it were in a material part of the indictment, it were hard to amend it: and as to the *Case of Sir John Curson* (*e*), it may be well; for the issue there was well entered in a docket, but ill on THE PLEA-ROLL, and no more than a mistake of entering THE

Vide ante, 263. Post. 286. 310.

See Rex *v.* Ponsonby, 1. Wils. 303.

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5. Mod 398.

(*a*) 3. Lev. 430.
(*b*) Cro. Jac. 502.
(*c*) Palmer, 480.
(*d*) 2. Bulst. 35.
(*e*) Cro. Jac. 529.

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PLEA-ROLL according to *the docket*, which warranted a right issue: and as to the case of *The King v. Reed*, as it is in *Keble* (*a*), the Court were of different opinions about it: A *venire facias* was against twenty-four, whereof *J. S.* was one, and a *distringas* of *J. S.* junior, and the cause tried by twelve, of which *J. S.* was not one; and KELYNGE said, it was amendable: ANOTHER would have it only an explication of the *venire*; and ANOTHER held it amendable by the *statute of Jeofails*, because not within the exception; but I do not find any judgment that it was amended; but at last it was looked upon to be no *discontinuance*. And he agreed, that whatever was amendable in civil cases at common law would be so in criminal matters, but that this would not be amended in civil cases at common law, and therefore not here.

HOLT, *Chief Justice*, *accordant*. It is not amendable. This is an omission in a point material, *viz.* in the *teste*, which by law should have been the *twenty-third*, and not the *twenty-fourth*, for the twenty-third is the day which the defendant has in court upon the *venire facias*; and therefore the writ giving further day should have issued on that day. It is objected, that there is no interval between the *twenty-fourth* and the *twenty-third*. I answer, that if one is to appear on the *twenty-third*, and appears, and receives no direction on that day from the Court when he shall come again, upon the expiration of the *twenty-third* he is out of court. Shall you then give him a day behind his back? Here indeed he has a day on THE ROLL, but the writ against the jury issues at a day after, when the party and they are out of court; so it is a writ awarded behind the party's back, and without warrant of the Court; for the warrant of the Court is "*die Lunæ post tres Mich.*"

* [286] * and then a precept is awarded to the sheriff to distrain, and this precept issues on the next day; and is this warranted by THE ROLL? No sure; therefore, being another writ than what the Court has awarded, it is no authority to distrain the jury, and then they had none to try the cause; for here is a material *variance* between the writ awarded, and that by which the jury were distrained; the one is the *twenty-third*, the other on the *twenty-fourth*, and the day of the writ is always the day of its *teste* in judgment of law: and he quoted the case of *Owen v. Baily* (*b*), in the seventeenth year of *Charles the Second*: One recovered damages in *trover*; the defendant afterwards sold his goods *bona fide*; the plaintiff took out a *fieri facias tested* on the first day of *Trinity Term*, which was before the sale, but taken out after; and it was held, that the goods in the hands of vendee were bound by it. By this amendment we should make this quite another writ; for a writ issuing on the *twenty-fourth* cannot be the writ awarded on the *twenty-third*. Suppose this were now immediately after the statute of 8. *Hen.* 6. c. 12. and before any *statute of Jeofail*, Why should this be amended? It is a *good writ* in itself, and the meaning of that statute was to amend *bad writs*, and not to alter a good writ, so as to adapt it to a particular purpose. Now to make this a good trial, you would have us alter this writ that is very good in itself, and, even contrary to truth,

Vide 1. Cro. 478. 375. 1. Jo. 302.

Ante, 263. Post. 310.

(*a*) (*b*) Comb. 483.

make

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make it a writ of the *twenty-third* of *October*, ſo to alter the very nature and ſubſtance of it. Now this being *a diſcontinuance of proceſs* in a civil caſe was helped by the ſtatute of 32. *Hen.* 8. c. 30. and ſince it is not material whether it be amended or not, becauſe the fault is cured by that ſtatute, there is no ſuch amendment as this between the time of 8. *Hen.* 6. c. 12. and 32. *Hen.* 8. c. 30. It is true, the *teſte* of writs have been amended; but when? When it was on *Sunday*, out of Term, or after the return, which is impoſſible to be, and therefore a plain miſtake of the clerk; and upon the ſame reaſon is the caſe in *Yelv.* 64. for there the *diſtringas* bore *teſte* the ſame day with the *venire facias*, ſo that the *teſte* was directly repugnant to the purport of the writ itſelf, which was to diſtrain the jury ſummoned on the *venire facias*, when in truth no jury could be ſummoned. I always have taken it, that if upon the return of one writ another be awarded, that that other ſhould bear *teſte* of the return of the firſt writ: and the caſe of *Bradley v. Banks* is very ſtrong in that point, and the common practice of the common pleas is ſo, though it be not ſo much obſerved here in writs of inquiry of damages: the one proceſs there is always *teſted* on the day of the return of the laſt; whether it be a *capias* in outlawry, or a *diſtreſs infinite*, the one muſt be *teſted* on the return of the other, or elſe all is diſcontinued. Aye, but this is a miſtake of the clerk; but we are to judge, whether it be not a miſtake in point of ſkill: Who can tell? Every clerk does not know; and ſome pretend that it need not be *teſted* on the day of the award: Why then ſhall we look upon this to be a fault in point of computation rather than that he thought it good? And if it be neſcience in the clerk, it is not helped even by the ſtatute of 8. *Hen.* 6. c. 12. though a civil caſe before the *ſtatute of Jeofails*.

See Carth. 76. 172. 367. 506. 520.

And he held that a new *venire* muſt go, for a new *diſtringas* would not do; for the firſt *venire facias* is executed; and the jury have now tried the defendant, * and that appears on record here, and the now *venire facias* is *ipſo facto* diſcharged, only an entry to be made on the roll, *quia apparet Cur.* that the *diſtringas* did not iſſue until the twenty-fourth. *Ideo conſideratum eſt quod caſſetur*, and *venire facias de novo* awarded.

Ante, 278. See Skinner, 46. 253, 254. 591. Carth. 70. 76. 172. 652, &c.

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Note, Powys, *Juſtice*, recanted *inſtanter*, and Gould, *Juſtice*, *hæſitavat*.

The Pariſh of St. Clements *againſt* The Pariſh of St. Andrew, Holborn. Caſe 383.

The ſeſſions may vacate an order made in the ſame ſeſſions.

An appeal by one pariſh from an order of juſtices for the removal of a poor perſon from the other pariſh to them. At the beginning of the ſeſſions the order was confirmed; and afterwards at the ſame ſeſſions, another order was made for the reverſal of the original order.

S. C. Salk. 606. Ante, 87. 163. 209.

A writ of *certiorari* being now brought, the order of confirmation, and alſo the order of reverſal, were both returned.

Et per Curiam—Firſt, The judgment of the juſtices is in their breaſt, and alterable by them all the ſame ſeſſions.

If the sessions make an order directly contrary to an order before made in the same sessions, the last order shall prevail, although there be no express words of repeal in it.

1. Jones, 330. Cro. Car. 341. 350. Salk. 496. 524. 534. Stra. 6. Ld. Ray. 394. 425. 2. Mod. 73. 10. Co. 101.

SECONDLY, If they make a subsequent order directly contrary to a former of the same sessions in the same cause, the subsequent one is an absolute repeal of the former, being inconsistent with it, though there be no express words of repeal in the second order: as if at THE OLD BAILEY, &c. one indicted of felony will not plead, and judgment of *peine fort et dure* be given against him (*a*), and he is carried away, and the next day he alters his mind, he shall be admitted to plead; and if he be convicted, he shall have judgment to be hanged, which is a *supersedeas* or setting aside of the first judgment.

POWELL, *Justice*, said, if there be two acts of parliament directly contrary one to another the same sessions, the last should only be taken for law (*b*).

HOLT, *Chief Justice*. If they both should generally refer to the same sessions, I do not know which to take for law. And he quoted a case of the *town of Colchester* here some years ago exactly like this; and for that the second order did not expressly repeal the first order, and that the justices did return them both as orders, the second order was quashed, and the first set up. And THE CHIEF JUSTICE put a case that was in chancery a day or two before, which was this: An appeal from a decree of THE MASTER OF THE ROLLS; and the question was, Whether new evidence that had arisen between the said hearing and decree, and the appeal, should be received? And it was held by THE LORD KEEPER, by POWELL, *Justice*, and HOLT, *Chief Justice*, that all the matter at THE ROLLS had fallen to the ground upon the appeal, and it was now the same thing as if nothing had ever been done in it, and by consequence the new evidence ought to be admitted.

But at last the matter here was referred by consent to the three Judges, or any two of them, to arbitrate.

(*a*) Now by 12. G. 3. c. 20. in felony and piracy the judgment shall be the same on standing mute as if the prisoner had confessed the indictment.

(*b*) See Rex *v.* Cator, 4. Burr. 2026.; Rex *v.* Davis, Cases Cro. Law, 228.

* [288]

Case 384. * Booth *against* Booth.

If judgment be signed under an agreement to stay execution for *a year*, execution may, after the year, be taken out without a *scire facias*; but not if *the stay* be only for *three months*, and the execution afterwards hindered by *injunction*.—S. C. 1. Salk. 5. Co. 88. 1. Salk 258. 3. Mod. 187. 189. Ante, 14. 130. 212. Post. 292. 296. 2. Leon. 7. Carth. 2. Run. Eject. 154. Stra. 100. 301. 3. Peer. Wms. 36. 4. Com. Dig. "Execution" (I. 4.). 5. Com. Dig. "Pleader" (3. L 14.).

JUDGMENT, with an agreement to stay execution for three months, within which time the defendant obtained an injunction in chancery against the plaintiff, so that he could not take out execution until after a year, and then he took out an *elegit* without a *scire facias*, and had it executed.

The doubt was, Whether the execution was not irregular.

POWYS,

Booth *against* Booth.

Powys, *Serjeant*, and Cowper, argued, that it was not. If the *cesset executio* were for a year after the judgment, yet the plaintiff within the next year might take out execution without a *scire facias*. (*Quod fuit concessum.*) So if the defendant bring a writ of error, and hang up the plaintiff for a year, and then is nonsuit, he may take out an execution without a *scire facias*. So here, if, before the time of the agreement be out, the defendant tie us up by his own act, so as we dare not take out execution within the time, shall he take advantage of his own wrong, by putting us into a worse condition?

Per Curiam. This practice is against a manifest rule of law, to take out execution after the year without a *scire facias*, and we cannot take notice of your chancery injunctions. Besides, it had been no breach of such an injunction to take out a writ of execution within the time, which might have saved the trouble of a *scire facias* after the year, by entering the continuance down by a *vic. non misit breve*; but that we cannot suffer to be done now, a writ not being taken out in due time; and if we should let this judgment stand, it would be an erroneous one, and therefore reversible by writ of error.

Therefore let a *supersedeas* go, *quia improvidè emanavit* (a).

Note, That there never is a *cesset executio* entered on the roll.

(a) See Winter *v.* Lightbound: The plaintiff obtained a judgment of Michaelmas Term generally, but was stopped from taking out execution by an injunction out of chancery, which being afterwards dissolved, he took out execution *tested* the last day of the subsequent Michaelmas Term, without suing out a *scire facias*; and the whole Court held the execution irregular, because taken out after the year had expired without a *scire facias*, 1. Strange, 301. But in the case of Michell *v.* Cue and his Wife, where on an execution sued out, without a *scire facias*, above a year after the judgment had been obtained, it appeared that the whole delay had arisen on the part of the defendants, by obtaining injunctions in chancery, and time for payment, the Court were unanimously of opinion, that the execution was well taken out, for that the rule, "that a judgment above a year old must "be revived by *scire facias* before execu- "tion can be taken out on it," was intended to prevent the defendant being surprized, and ought not to be taken advantage of by those who cause the whole delay, 2. Burr. 660.

The Queen *against* Collingwood.

Case 385.

To *persuade* an apprentice to embezzle his master's goods is an indictable offence; but the indictment must positively aver, that he did take away the goods in consequence of such persuasion.—S. C. 3. Salk. 42. S. C. 2. Ld. Ray. 1116. 1. Salk. 380. 12. Mod. 195. Ante, 99. 182.

It was an indictment, and conceived thus: "*Jurat. &c.* "*præsentant, quod* T. C. *nuper, &c. existens persona malæ* "*dispositionis ac non intendens victum suum per labores honestos* "*quærere, sed machinans et intendens servientes et apprenticios* "*honestorum civium et inhabitant. civ.* London. *in moribus et statu* "*suis prægravare et destruere, ipse præd.* T. C. *vicessimo die* "*Martii, anno, &c. et diversis aliis diebus tunc antea, apud* "London, *viz. in paroch.* S. B. *in warda de* D. London.

"*præd.*

THE QUEEN *against* COLLINGWOOD

" *præd. quendam* C. S. *servientem et apprenticium cujusdam* R. T. " *de* LONDON, warehouse-keeper, *illicitè, injustè, et nequiter* " *movit, seduxit, et allexit, sexcent. septuagint. duas virgatas panni* " *lanei*, VOCAT. callamancoes, *valor. vi. lib. de bonis et catallis* " *præfat.* R. T. *extra præd. domum et shopam ipsius* R. *illicitè,* " *injustè, et nequiter capere et asportare. Et quod præd.* T. C.

[289] " *dicto xx. die, &c. anno, &c. supradict. et diversis * aliis diebus* " *et vicibus, bona et catalla præd. à præd.* C. S. *servient. et* " *apprenticio præd.* R. T. *adtunc et ibidem apud dict. paroch.* " B. &c. *illicitè, injustè, et nequiter, cepit, recepit, hab..., et ad* " *usum proprium ipsius* T. C. *convertit, eodem* T. C. *adtunc et* " *dictis aliis diebus et vicibus bene scient. præd.* C. S. *fore servient.* " *et apprenticium præfat.* R. T. *ad grave damnum ipsius* R. T. " *in malum exemplum omn. aliorum in consimili casu delinquentium,* " *contra pacem dominæ regin. nunc coron. et dignitatem suam.*"

After conviction, several exceptions were taken by MONTAGUE:

2. Roll. Abr. 79. K. Keilway, 87.

FIRST, That it was not directly said that the apprentice did actually take away the goods, but only that the defendant did intice him to take them away, and did receive them from him; which is a strong argument indeed that they were taken away, but no direct positive charge, as the fact ought to be laid in an indictment. And for this he relied on the case of *The Queen v. Daniell* (*a*).

SECONDLY, It is not said where the house and shop of *R. T.* is, and by consequence no *venue* where the supposed taking by the apprentice was.

Ante, 99. 182. 1. Salk. 380. S. C.

PER CURIAM. The indictment in the case of *The Queen v. Daniell* went upon two points; the one was, for seducing an apprentice from his master; the other, for persuading him to take away his goods. As to the first, which was the only point in judgment, we held the offence not indictable (*b*), and there was no *venue* laid for the second.

And THEY ALL WERE OF OPINION, that the charge ought to be direct, and not argumentative; and that it was not enough to lay an inticement, without an act done in pursuance of it. You shew here a special matter, *viz.* that the defendant received them, but do not shew that they were taken away; and if this were felony, as you here shew it, the defendant would only be *accessary*, and that could not be without a principal fact committed. Here indeed you might have charged him as *a principal*, for he who persuades another to commit *a trespass* is *a principal*, and the taking of the apprentice here is the taking of the defendant; but you do not shew where that was.

2. Roll. Abr. 79. K.

(*a*) Ante, 99. 101. 182.

(*b*) But an action of trespass lies by a master for seducing his journeyman or other servant from his service, Hart v. Aldridge, Cowp. 54.

And PER OMNES, It cannot be maintained. But THE COURT gave them time till next Term to see to maintain it *(a)*.

(a) Judgment was given for the defendant upon the first exception, 2. Ld. Ray. 1118. S. C. 3. Salk. 42.

* [290]

* Clerk *against* Withers.

Case 386.

If *A.* obtain a judgment against *B.* and sue out a *fieri facias*, on which the sheriff takes the goods of *B.* in execution, the debt is discharged by such seizure; and if *A.* die after such seizure, and the sheriff be removed before the sale, the succeeding sheriff may compel his predecessor to sell them; and therefore *B.* cannot sue out a *scire facias* against him to have restitution of the goods, for the death of *A.* does not abate the execution.

S. C. 1. Salk. 322.
S. C. 11. Mod. 34.
S. C. Holt, 303. 646.
S. C. 2. Ld. Ray. 1072.
Post. 291.
12. Mod. 604.
Ld. Ray. 40. 244. 252.
1. Burr. 30.
1. Com. Dig. "Administration" (G.).
4. Com. Dig. "Execution" (C. 6). (C. 8.).

THE CASE was thus: *F. Dives*, as administrator of *J. Dives*, recovered three hundred and three pounds against *Clerk*, upon a bond to his intestate, upon judgment by default in the common pleas, and sued out a *fieri facias tested* of *Trinity Term*, in the first year of *Queen Anne*, returnable *tres Mich.* directed to THE SHERIFFS OF LONDON, which was delivered to the sheriff on the first of *August* in the same year, who, on the same first of *August*, seized goods to the value. *F. Dives*, the administrator, died on the ninth of *September* following. The sheriff returned the seizure to the value, *sed remanent*, &c. *pro defectu emptorum*. On the twenty-ninth of *September* the sheriff was removed, and another put in. The plaintiff *Clerk* now sued *scire facias* against the then sheriff for restitution of his goods, and upon demurrer judgment was given against the plaintiff in the court of common pleas, and he brought a writ of error.

And now, the case having been twice solemnly argued at the bar, THE COURT *seriatim* affirmed the judgment.

At the bar three points were insisted on for the plaintiff in error;

FIRST, That in this case the property remained still in him.

SECONDLY, That his proper remedy was a *scire facias*.

THIRDLY, That the defendant's plea, *viz.* that he was bound to sell the goods, and compellable so to do by a *distringas super vicecomitem*, was not a good plea.

And two things were said to be considerable in THE FIRST POINT, *viz.* the death of the intestate's administrator before sale, and likewise the removal of the sheriff and his return. It is not to be controverted, but that if a man has judgment, and sues out a *fieri facias*, and goods are seized, and then the plaintiff dies, the sheriff is bound to sell, and give the money to his executor or administrator; but here, as was urged, there is none that can sue out process to compel the sheriff to sell, or to perfect this inchoate execution, because none is privy to the administrator; for his own executor cannot do it, because it was *in auter droit*, and the administrators *de bonis non* are not privy to the plaintiff, but immediately from the first intestate: and for this reason it was, that such an administrator could not, at common law, sue execution upon a judgment obtained by the executor or administrator of his intestate *(a)*; a mischief which is remedied by the statute of 17. *Car.* 2. c. 8. and now where an executor or administrator has judgment *after verdict*, and dies before execution sued out, the administrator *de bonis non*

(a) See Yelv. 83. Cro. Jac. 4.

may

CLERK *against* WITHERS. may sue out execution; but that statute extends not to this case, being *by default*. Besides, that statute enables them to revive such judgment by *scire facias*, but takes no care to perfect executions commenced only, but not perfected. And the seizure by the sheriff does not alter the nature of the debt, but it remains still a
[291] *chose in * action*, and of the nature of the bond on which the first suit was. And then it is as if no execution had been sued; in which case the administrator *de bonis non* cannot sue out execution, even by *scire facias* upon the statute; therefore the property remains in the plaintiff. And if the sheriff be not compellable to sell by process at the suit of this administrator, surely he cannot sell at all; for it would be very odd to say that it shall be at the election of the sheriff whether he will sell or not. This is not like the case of *Harrison v. Bowden (a)*, where an executor had judgment, and afterwards took out an *elegit*, and died intestate before the debt was levied, and it was held, that the administrator *de bonis non* should have the benefit of it; for there was a complete execution, which ought not to determine by the death of the executor intestate; but here there was nothing complete, nor can the administrator take these goods in satisfaction of his debt. And none then has right to them but the plaintiff. An executor sued *an extent* upon *a statute staple (b)*, and the writ was returned "*served*;" but the plaintiff died intestate before a *liberate* sued out; and it was held *per Curiam*, against CROKE, *Justice*, that the administrator *de bonis non* could not proceed upon this execution, he being not privy to the executor who sued out *the extent*: so in the principal case: and the like privity is necessary to have a *venditioni exponas* as to a *liberate*. The general property of the goods must continue in the defendant, for the sheriff has it not; for by a grant of "all his goods" these would not pass, nor would they be forfeited by a felony or outlawry of the sheriff, as his own goods would be: and he only has a power to sell them, as a commissioner of bankruptcy has to sell the goods of the bankrupt, and his having them in possession enlarges not his property (*c*). The property is not altered by the seizure (*d*); and if after the seizure the defendant had paid the money, he might have taken his goods again without any grant to be made by the sheriff; and *trover* would lie against the sheriff for detaining the goods after such payment. Indeed, the special property may be in the sheriff for his safety (*e*). He may bring *trover* for such goods against a stranger (*f*), as a carrier may for goods given to him to carry (*g*); and the reason in both cases is the same, *viz*. for their safety, they being both answerable over to the general owners (*h*). If goods in execution perish without default of the sheriff, it is the loss of the defendant (*i*), which shews the property to be in him;

1. Cro. 208. 227. Cro. El. 319. 451. 457. 459. 639. 1. Co. 96. 1. Jo. 248. 386. Cro. Jac. 4. 194. Yel. 33.

2. Saund. 345. 1. Mod. 12.

(*a*) 1. Sid. 29.
(*b*) Cleve *v.* Vere; Cro. Car. 450. S. C. 1. Jones, 385.
(*c*)
(*d*) Dyer, 99.—See also Ayre *v.* Alden, Yelv 44 S. C. Moor, 757.
(*e*) See 1. Vent. 52. 2. Saund. 47.
(*f*) Wilbraham *v.* Snow, 1. Mod. 30. S. C. 2. Saund. 47. S. C. 1. Sid. 438. S. C. 1. Lev. 282. S. C. 1. Vent. 52.
(*g*)
(*h*) See Holliday *v.* Camsel and White, 1. Term Rep. 658.
(*i*)

for

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for if it were not, Why ſhould it be his loſs? And it was urged, that the party could be ſued *de novo* for this debt by the adminiſtrator *de bonis non*; and therefore he ought to have his goods again, that he may not be twice charged. The party is not diſcharged by the ſheriff's return, that he ſeized goods to the value; nor is the ſheriff by ſuch return chargeable, for the ſheriff has done but his duty (*a*). There will be no inconvenience in reſtoring thoſe goods, for here were laches on the other ſide, for they might have taken an aſſignment of the goods immediately upon the ſeizure. * And he quoted the caſe of *Ayre v. Alden* (*b*), that a ſheriff after amoval cannot ſell (*c*). And this is a very proper remedy for the plaintiff, for the ſheriff's return of ſeizure of the goods, and that *remanent pro defectu emptorum* is enough to ground a *ſcire facias* upon. [292]

Quod fuit conceſſum, if the execution were determined by the death of the party adminiſtrator.

RAYMOND *contra*. The defendant is diſcharged by this ſeizure to the value of the debt, and therefore there is no reaſon that he ſhould have his goods again. At common law his goods were ſo bound by the *teſte* of the *fieri facias*, that he could not afterwards alter the property of them (*d*); but now, as to a ſtranger, it has not that operation. In the caſe of *Smalcombe v. Croſſe*, in *Michaelmas Term*, in the ninth year of *William the Third* (*e*), there were two executions, one *teſted* before the other; the laſt was firſt delivered to the ſheriff; and it was held, that the ſheriff ought to execute that which was firſt delivered to him, but that if he execute the laſt the execution is good, and the party has his remedy againſt the ſheriff; but that as to the party himſelf, his goods are bound by the *teſte*. If the ſheriff ſeize to the value of the debt, the defendant is diſcharged (*f*), though the ſheriff do not ſatisfy the plaintiff; and the plaintiff cannot ſue out a new execution; for the ſheriff, by the ſeizure, becomes liable to him (*g*). If the ſheriff will not make a return, it is a contempt of the Court, for which they will deal with him (*h*); and if he return the truth, the proper remedy is a *diſtringas nuper vicecomitem* (*i*). By the caſe of *Wilbram v. Snow* (*k*), the ſheriff, after his office is determined, may ſell by a *venditioni exponas*. In *Thorowgood's Caſe* (*l*), execution was ſued out, and

1. Salk. 320, 323. Vide Mo. 402. Cro. El. 370. Cro. Car. 459. 487.

2. Saund. 47. 345. 1. Sid. 438. 1. Mod. 12. 40. 1. Vent. 52. 1. Lev. 282. 1. Mod. 12. 30. Poſt. 298. 1. Ro. 4.

(*a*) 2. Saund. 344.

(*b*) Yelv. 44. Moor, 757. 1. Roll. Abr. 894.

(*c*) But the whole Court were of a contrary opinion, and it was decided, in this caſe of Ayre *v.* Alden, as reported by *Croke*, that goods ſeized under a *fieri facias* may be ſold by the ſheriff after he is out of his office, without a *venditioni exponas*, Cro. Jac. 73.

(*d*) 1. Leon. 304. Cro. Eliz. 174.

(*e*) Comy. Rep. 34. S. C. 5. Mod. 376. S. C. Holt, 302. S. C. 12. Mod. 146. S. C. 1. Salk. 320. S. C. 3. Salk. 159. S. C. Carth. 419.—See alſo 2. Bac. Abr. 456. 4. Bac. Abr. 460. 3. Com. Dig. 308. Viner's Abr. "Execution" (A. 2.). pl. 18. (Q. a. 2.). pl. 14. "Time" (A. 3. pl. 6.). 1. Term Rep. 729. 4. Term Rep. 409.

(*f*) 2. Roll. Rep. 57.

(*g*) See ſame point Year-Book 20. *Hen.* 6. pl. 24.

(*h*)

(*i*) Year-Book 43 *Hen.* 36. a. Fitz. Abr. [illegible] ..oceſs," 89.

(*k*) 2. Saund.

(*l*) Noy, 73.

goods

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goods seized after the party died, and it was doubted what should be done with the goods, and ruled that they should be brought into court. The sheriff by seizure gains a property, and is answerable for *rescous* and other casualties. He may have *trespass* against the party himself (*a*), and *trover* (*b*).

HOLT, *Chief Justice*. It is material who ought to have the goods; for if there be none who can make title to them by virtue of this execution, the first owner ought to have restitution. If this had been before the statute 17. *Car*. 2. c. 8 he should, it seems, have them back; so the doubt is, Whether he will bring this case within the equity of that statute? The case of *Harrison v. Bowden* (*c*) does not come up to this, for the lands were actually extended and delivered before the administrator died, and nothing more remained to be done; but the very having administration *de bonis non* vests it in him. The question here is, Whether the administrator *de bonis non* can pursue this inchoate execution by a *distringas nuper vicecomes*; and if he cannot do that, it will necessarily follow that there ought to be restitution. It is true, if goods, * to the value of the debt, be seized, though the writ be not returned, that discharges the defendant, unless the execution be afterwards avoided; so that the seizure, as long as it continues, is a sufficient bar. Suppose then it cannot be carried on for want of privity, for he might have begun again before the statute of 17. *Car*. 2. c. 8. if there had been a verdict, it might well be judged within the reason of that statute. If the administrator had died before the seizure, would not the writ abate? If the sheriff had sold, and before payment the administrator had died, shall not the administrator *de bonis non* have debt against the sheriff? Surely he shall; for now here is a new debt arises to the administrator, as he is administrator. It may be he has not privity enough to sue process; but he shall have debt, and compel the sheriff to make a return in order to bring his action. If goods be taken on a *fieri facias*, and a *writ of error* is brought, and a *supersedeas* come before sale, yet the sheriff shall sell, *Dyer*, 99.; though 2. *Roll. Abr*. 291. be *contra*. After seizure, and a writ of error, and *supersedeas*, a *venditioni exponas* shall go (*d*). If a sheriff seize goods to the value, and return it, he is bound to find buyers, or else why should a *distringas* go against him to sell them to the value? for a *distringas* is a compulsory writ to sell, at the value, upon pain of forfeiture of issue: and if he be so compellable to sell, Why should not debt lie against him? If goods be rescued from a sheriff, he is not liable (*e*); for it is not the *rescous*, but *the return*, that makes him liable, that is, the return of seizing goods to the value; and therefore he ought to seize a convenient quantity to enable him to return a seizure to the value with safety; for the sheriff, by his return, is charged to the value at all events, except by the act of God.

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1. Salk. 12. 318. 320. 322, 323. 2. Keb. 257.

1. Burr. 25.

POWELL, *Justice*. It is clear by THE YEAR BOOK of *Henry the Sixth* (*f*), that if a sheriff return that he has goods in his hands for

(*a*) Cro. Eliz. 6?8.
(*b*) 1. Sid. 438. 1. Vent. 52. 2. Saund. 47.
(*c*) 1. Sid. 29.
(*d*) 5. Co. 90. Cro. Jac. 245.
(*e*) Smith *v*. Martin, 2. Saund. 400.
(*f*) 34. *Hen*. 6. pl.

want of buyers, and is afterwards amoved, a *diſtringas* ſhall go to the new ſheriff to diſtrain the old ſheriff to ſell the goods, and give him the money to bring it into court. If the goods were reſcued out of his hands, debt would lie againſt him; but if there be no default againſt him in not ſelling of the goods, it were hard if an action ſhould lie againſt him. It is true, by levying the goods, whether they be ſold or not, or a return be made or not, the defendant is diſcharged; for if a new debt be brought againſt him, he may plead that it was raiſed by *fieri facias*. And ſurely the property by the execution is out of the defendant, whoſe goods they were; but if by any accident the execution determine, he ſhall have them again: Who then has the general property in the *interim?* I cannot tell but it may be *in abeyance*. And he ſaid, that the return did not make him liable to debt. If this were after verdict, the ſtatute would have clearly helped it.

In THE SECOND ARGUMENT, *for the plaintiff*, three things were urged:

FIRST, That debt after ſuch a return as here, would not lie by an adminiſtrator *de bonis non* againſt the ſheriff.

*SECONDLY, Not in any caſe. *[294]

THIRDLY, Though it were a *choſe in action* in right of the firſt inteſtate, yet in this caſe it would not be ſo.

FIRST, If the action did lie by the adminiſtrator *de bonis non*, it muſt be upon the ſeiſin and return of the ſheriff; but before the return was made, the adminiſtrator died, as appears by the record, and therefore the right of action never veſted in the firſt adminiſtrator; and, it never having veſted in any under whom he may derive it, it is not ſuch a *choſe in action* as he can take the advantage of.

SECONDLY, The ſheriff being a public officer, the Court will be tender of charging him with actions without an apparent default in him; for if he return *cepi corpus et paratum habeo*, and it appear to the Court that there is no default in him in not having him forthcoming, an action will not lie (*a*). And if a *ſcire facias* would not have lain upon a judgment by the adminiſtrator of an executor, or the adminiſtrator of another, *à fortiori* debt will not lie for him for want of privity (*b*). If a ſheriff return that he has levied the money, he ſhall not be excuſed from debt, becauſe he might have paid it over (*c*). Debt lies not againſt a ſheriff upon his return, when he does not miſbehave himſelf. It is a rule, that one ſhall never have an action for damages for a thing until he has a right to the thing itſelf. In the caſe of *Benſon v. Flower* (*d*), Money in the ſheriff's hands was aſſigned by commiſſioners of bankrupt, and held void, because it was not the bankrupt's money; *à fortiori* in this caſe.

Vide 1. Sid. 29. 79. Hob. 10. 8. Co. 136. 1. Keb 313. 1. Jo. 345. Cro Car. 149. 150. 187. 200.

(*a*) Cro. Jac. 514. 2. Roll. Rep. 57.
(*b*) See 1. Sid 407.
(*c*) 2. Saund. 247.
(*d*) Cro. Car. 176. 1. Jones, 215.

THIRDLY,

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THIRDLY, The statute of 17. *Car.* 2. c. 8. does not help this case. The rule upon equitable construction of a statute is, that whatever is within the reason and equity of a statute, though it be not expressed, shall be adjudged within the remedy, as if actually expressed; as if several particulars be enumerated, and one of the like reason and mischief omitted, it shall extend to it as much as if it had been expressed: and the 17. *Car.* 2. c. 8. is calculated to a particular purpose, that is, to give an administrator *de bonis non* an execution upon a judgment obtained by an executor or administrator, that is, to save him the benefit of the judgment, which generally is not obtained without great charges and delay; but it had no regard to executions commenced, *viz.* to save the benefit of them.

DEE *contra.* A writ of *fieri facias* or *capias ad satisfaciendum* needs no return to make it good, as an *elegit* does, because an inquisition is necessary to be taken in that process, which is not so in the others (*a*). If goods be seized upon in the life-time of an administrator, who dies before sale, the administrator *de bonis non* shall have advantage of that execution; but the Book does not say how (*b*). The sheriff may and ought to sell the goods without a *venditioni exponas* (*c*): besides, there is nobody in court to inform them that the party is dead; and if so, the Court *ex officio* ought to award a *venditioni exponas* upon the return here made; that is, when the sheriff informs the Court that he has commenced, but not perfected

[295] the execution, * whether the Court will not command him to perfect it? An administrator *de bonis non* would have an action for a *false return* against the sheriff (*d*); and *à fortiori* will it be in such case where the sheriff charges himself with a duty to the first testator; and that this general return does charge with a duty to the first testator appears from this, that after such a return he cannot, upon *venditioni exponas*, return that he sold for less. If indeed he had returned *a special seizure*, and mentioned the goods in particular, and they appear to be *bona peritura*, he may return upon the *venditioni exponas* that he sold for less than the debt (*e*). And though the words "after verdict" be in the statute of 17. *Car.* 2. c. 8. yet surely the statute shall extend to other cases than such as are after verdict; as if the judgment be by confession; and this is such a mischief as the makers of that statute meant to avoid, as appears by the title and preamble thereof. And for equitable constructions he quoted 2. *Inst.* 429. *Bro.* "*Bar*," 50. *Hale's Placitorum*, 23. *Dyer*, 186. Besides, this writ is wrong in itself; for the sheriff may and ought to sell the goods without a *venditioni exponas.* All the writ suggests is, that he took the goods, but it does not say that he had them at the time of the writ purchased; whereas it should suggest, that they still remain in his custody.

SECONDLY, They do not tell what the goods are, that, in case there be judgment, execution may be thereupon.

(*a*) Com. Dig. "Retorn" (F. 1.).
(*b*)
(*c*) 1 Roll. Abr. 893. 4. Com. Dig. "Execution" (C. 6.).
(*d*) 4. Mod. 404.
(*e*) Gilb. Ex. 22.

HOLT,

Holt, *Chief Justice*. As to the fault in the writ, in not suggesting that the goods remained in his hands, it might be fatal, if it were not helped by your plea, *viz.* that you are compellable to sell them by a *distringas*, &c. which admits that you have them.—The great question is, Whether the sheriff by actual seizure has not vested such an actual right in the administrator, that, in case he had died, the other might have had an action? If he had sold the goods, and, before payment, the administrator had died, yet by that there is such a right in the administrator as administrator, and that right goes to the second administrator, who represents the intestate in whose right the first administrator had it. The sheriff out of office may sell without a *venditioni exponas*, otherwise why should a *distringas* go to the new sheriff to command the old sheriff to sell? There are two sorts of *distringas nuper vicecom.*; the one, according to the statute of 34. *Hen.* 6. to command the old sheriff to sell, and bring the money into court (*a*); the other to command him to sell, and to deliver the money to the new sheriff. Now this *distringas* does not give him an authority to sell, but is compulsive upon him to sell; and if he do not, he forfeits issues *toties quoties*. When the sheriff returns, "seizure *ad valentiam*," and "*remanent pro defectu emptorum*," that is only that the law gives him a convenient time to sell; and if he continue in his office, a *venditioni exponas* shall go; and if he be out of his office, a *distringas nuper vicecom.* goes to the new sheriff to distrain the old sheriff to sell, &c. as is said before. Now then when he has returned a seizure to the value, and * that he is compellable to sell under penalty of forfeiting issues, it is an immediate charge upon him even to the value of the goods. It is true, it is a good return for him to the first *fieri facias* that he has seized to value, and that they remain in his hands for want of buyers, for he has convenient time to sell, but he shall not always keep them in his hands for want of buyers; for he cannot return upon a *distringas* that the goods remain in his hands for want of buyers. If they be perishable goods, or the act of God intervene, he may plead that as a reason for selling them at an under rate, and for less than the value of the debt. A *scire facias* issued against a sheriff upon a return of goods seized to the value of the debt, and he pleaded a *rescous*, and it was held not good (*b*). And he quoted the case of *Mildmay v. Smith* (*c*), that debt lies against him upon such *seisin* returned, after the goods are rescued from him. What is the *gist* of the action? Not the *rescous*, but the sheriff's having goods to the value. Then it is hard to say, that the sheriff is not liable to the administrator; and if so, there is no colour for this *scire facias*. But to the equity of the statute of 17. *Car.* 2. c. 8. where the statute makes the distinction of a verdict, it is hard to carry it farther; but this does not appear, on the *scire facias*, to have been after verdict; for it was only said, that the action was brought by the administrator, in which *taliter processum fuit*, that

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2. Keb. 789. 821.

Vide 1. Cro. 539.

2. Cro. 514. 555 556.

Mo. 468.

Godb. 276.

(*a*) Rastal, 164. Thesaur. Brevium, 90.

(*b*)

(*c*) 2. Saund. 343.

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he obtained judgment. If this had appeared to have been after verdict, without all doubt the statute would have reached to it, since an administrator *de bonis non* may thereby commence an execution upon a judgment by a prior executor, &c. *à fortiori* he may perfect an execution commenced by him: and though you say that the writ is bad, in not mentioning the goods in particular of which restitution is demanded, surely that is not so; for if goods be taken in execution, and, before sale, judgment be reversed, there shall be a *writ of restitution* without particularizing (*a*). And as to the statute of *Westminster the Second de Religiosis*, being taken by equity, there the word "default" is a default in court; not only by not appearing, but also in not pleading, or pleading faintly, &c. by collusion. Suppose a tenant in tail suffer a recovery, and die, the issue may falsify this, that is, he shall not falsify the very point tried, but he shall say, that his ancestor might have given such and such evidence in maintenance of his title, and omitted to do it: and if a writ of entry in the *post* be brought, and the issue is, whether *J. S.* died seised or not, and it is found against the tenant in tail, his issue after him shall not come and say, that he did not die seised; but he may come and say, that such evidence might have been given in maintenance of the title. If the goods could be restored here, the *scire facias* would be very proper, and need not be more special than the sheriff's return is on which it is grounded (*b*): and no doubt, if the goods had been sold, the administrator might have an action for the money; but whether it will lie upon his having goods to the value, is considerable.

3. Mod. 384. Post. 298.

10. Mod. 412. Ld. Ray. 1051.

[297] * POWELL, *Justice*. This is a new case; but, if this writ be proper and reasonable, its novelty is no exception to it, for there is a time for every thing to begin. If none has a right to challenge the sheriff in right of the original plaintiff, the defendant ought to have the goods again. If this had been *detinue*, the goods must have been particularly mentioned; but it may well be, that this *scire facias* ought not to vary from the return. If it be not after verdict, it cannot be within the equity of 17. *Car.* 2. c. 8. nor is it like the cases upon the *statute of Religiosis*; for there the fraud is the thing designed to be prevented: and the case quoted out of *Hale's Pleas of the Crown* is not by an equitable construction of the statute of 25. *Edw.* 3. Petit Treason, but is within the letter of it; for *Mrs.* is *a Master*: so it seems to turn much upon the judgment in the case of *Stiles v. Finch*(*c*), where the sheriff returned a *rescous*, and the action was maintained against him. But I cannot tell whether the having the goods in his hands, or the suffering them through his default to be carried from him by force, be *the gist* of the action. He agreed that the *venditioni exponas* and *distringas* were not as powers or authorities to sell, but commands to do that which he had power, and ought to do before; for the sheriff

(*a*)
(*b*) Prac. Register, 496. 5. Com. Dig. "Pleader" (3. L. 3.).
(*c*) Cro. Car. 381.

is bound to sell; but that must be in convenient time. But what sticks with me is, that if such an action will lie upon such a return as here, and the sheriff sell as soon as he can, and by casualty cannot sell to the value; whether he cannot plead this matter?

Now PER TOTAM CURIAM the judgment was affirmed.

GOULD, *Justice*. It is plain, that the plaintiff, *Clerk*, is discharged of the debt by the seizure of goods to the value, and may plead that matter in his discharge: if the money had been levied by sale, he might do it (*a*); and if the money be not levied, but *goods* to the value seized, he may plead that his goods *ad valentiam*, &c. were seized by virtue of a writ (*b*). Debt was brought uppn a bond, in which two were jointly and severally bound against one of the obligors, who pleaded a judgment had against his co-obligor, and a *fieri facias* thereupon, and goods seized to the value, but no return made, and it was adjudged (*c*), that if the former action were against himself it had been a good plea, but the doubt was, because it was against another. That the sheriff may sell the goods, though out of his office, by virtue of the *fieri facias*, appears by the case of *Ayre v. Alden* (*d*); and then he may bring the money into court, and then it is to remain here until the administrator *de bonis non* shall come and take it. If a *fieri facias* be sued out, and the plaintiff die, and then the sheriff levy the money, and bring it into court, it shall there remain until administration sued out, and then the administrator shall have it (*e*). So if a *fieri facias* be sued out, and the goods are seized, and the plaintiff die before sale, and then the goods are sold, the administrator shall have the money; and it is no good return to say, that the plaintiff is dead, for that does not abate the writ (*f*). In *Clere's Case* (*g*) it is agreed, that if there be an *extendi facias* by an administrator, and upon the return thereof *a liberate* issue in his lifetime, and he die * before execution of the *liberate*, yet the administrator *de bonis non* shall have the benefit of it (*h*), *Harrison v. Bowden*. So here the execution is executed in the life of the administrator; and the sale, *viz*. the formal part, may be done by virtue of the same writ. The sheriff, by the levying of goods by a *fieri facias*, as he seizes the goods, gets a property in them against all persons, and may have trespass against the true owner if he should retake them (*i*), and so he may have *trover*, as appears in the case of *Wilbraham v. Snow* (*k*), where KELYNGE, *Chief Justice*, held, that he gains a general property; but all the rest say, it was only a special property so as to sell, &c. If the sheriff had returned, that he levied to the value of a hundred pounds, he would thereby charge himself with so much money; and debt for so much would lie for the

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1. Cro. 328.
1. Jo. 326.
Ibid. 430.
1. Cro. 539.

1. Salk. 323.
11. Mod. 34.

See Skinner, 143. 232. 650.
Vide 1. Vent. 41. simile.

* [298]

1 Sid. 29.
Yelv. 33.
1 Cro. 208. 227. 451. 457, &c.
Mo. 757.
Cro. 73.
3. Cro. 639.
Vide 1. Vent. 52.
1. Lev 282.
1. Sid. 438.
1. Mod. 12. 30.
2. Keb. 588.
2. Saund. 47. 345.
Ante, 292.

(*a*) Langdrew *v*. Wallace, 1. Lut. 588.

(*b*) Mountney *v*. Andrews, Cro. Eliz. 237. Rook *v*. Wilmot, Cro. Eliz. 209. Atkinson *v*. Atkinson, Cro. Eliz. 591.

(*c*) Dilks' Case, Trinity Term, 36. *Car*. 2. Roll 504.

(*d*) Cro. Jac. 73.

(*e*) Thoregood's Case, Noy, 73.—See Vincent *v*. Dale, Dyer, 76. b.

(*f*)

(*g*) Cro. Eliz. 877. Cro. Jac. 31.

(*h*) 1. Jones, 386. – See also Harrison *v*. Bowden, 1. Sid. 29.

(*i*) 3. Cro. 639.

(*k*) 2. Saund. 47. 1. Sid. 438 1. Vent. 52. 1. Lev. 282. 1. Mod. 30.

adminiſtrator *de bonis non*. This is not like the caſe put before of *an extent*; for in that caſe there muſt be *a liberate*, which is by award of the Court.

Powys, *Juſtice*, *accord*. Executions are favoured in law. This execution is ſo far completed, that it is a veſting of the property in the ſheriff. The ſelling is but a formal part of the execution, and by the ſeizure and writ he has authority to ſell; and the *venditioni exponas* adds not to his authority, but is to ſpur him on to ſell. The goods by the ſeizure are *in cuſtodiâ legis*. The

3. Cro. 181. 5. Mod. 384. Ante, 296. 12. Mod. 604. caſe of *Harriſon v. Bowden* (*a*) is ſtronger than this, where the very taking out of a writ of *fieri facias* is ſaid to be ſuch a veſting of the goods in the adminiſtrator, as the adminiſtrator *de bonis non* may take advantage of. And he relied on *Thorogood's Caſe* (*b*).

Powell, *Juſtice*, *accord*. The plaintiff in this *ſcire facias* ſhall not have the goods again, becauſe the execution was executed in the former adminiſtrator's life-time, and his death ſhall not abate the writ. How it would have been if it had not been exe-

10. Mod. 270. 307. cuted in the party's life-time I ſhall not ſay. Execution is an entire thing; and therefore where a ſheriff levies goods, and, while they remain in his hands for ſale, a new ſheriff is choſe, he who begun the execution ſhall go on with it, and ſell the goods, and not deliver them over to the new ſheriff, who is the officer of the Court. The reaſon is, that execution is one entire thing (*c*), and therefore where it begun it ſhall end; and that is the reaſon that a *ſuperſedeas*, after execution begun, ſhall not ſuperſede it upon a writ of error, becauſe it is an execution from the firſt levying of the goods; and not like the caſe of an *extendi facias*, becauſe the *extent* is only a ſeizure into the king's hands, and there muſt be ano-

Vide 1. Vent. 41, 42. ther award of the Court, *viz.* a *liberate* to deliver them over to the plaintiff; and it has been held, for that reaſon, that an adminiſtrator *de bonis non* ſhall not have the *liberate*, for there was ſomething further to be done by the Court in that which was not done in the adminiſtrator's life-time, but here nothing is to be done. The *venditioni exponas* is not of neceſſity, nor does it give to the ſheriff authority to ſell, but ſerves only to quicken the ſheriff to do his duty.

[299] It may be aſked, * what ſhall become of the money? for he is commanded to have the money in court, and yet here is none to receive it. True, the money muſt be brought into court, and remain there as money recovered by the dead perſon, and to be delivered out to ſuch as the Court ſhall be appriſed to be entitled to it.

Holt, *Chief Juſtice*, *accordant*. After ſeizure of goods, there is nothing more to be done by the ſheriff to the plaintiff; although if he were to ſell the goods, and deliver the money to the plaintiff, it would be well; yet the words of the writ are, "that he "levy money, and bring it into court;" and that may be done

(*a*) 1. Sid 29.
(*b*) Noy, 73.—See alſo Dyer, 76. b.
(*c*) Year-Book 34. *Hen.* 6. pl. 36.

notwithſtanding

notwithstanding the plaintiff's death; therefore he having nothing further to do with the plaintiff but to execute the writ, he may, notwithstanding the death, do it.—In the next place, it is true, after he has seized goods to the value of the debt, though he be out of office, yet he is bound to make sale of the goods, and to make a return; and when he has made a return of a seizure of the goods, and that they remain in his hands for want of buyers, that is not a discharge of the command of the writ, but only an excuse that he has not the money; and he is compellable by law to bring it in, and though a *venditioni exponas* does lie, yet a *distringas* is the proper remedy. And there are two sorts of *distringas nuper vicecom.* before mentioned (*a*); the one a *distringas* to the new sheriff to distrain the old one to sell the goods, and bring the money into court; the other to distrain him to sell, *et denar. inde provenientes*, to deliver to the new sheriff to bring into court. Now if a *distringas* lies for the new sheriff to compel the old sheriff to sell, that shews the old sheriff has an authority to sell by virtue of the former writ; and that which commands the new sheriff to distrain the old one to sell, and bring in the money, is the most usual (*b*). Now then since the sheriff is compellable to sell, having seized the goods, what should hinder in this case that he should not sell notwithstanding the plaintiff's death; for the writ is as forcible and compellable upon them to levy and bring in the money as if the plaintiff had lived. The sheriff after seizure is bound to the value of the goods. It is not to be supposed that he cannot sell; for he is bound to sell at all events. If the goods be worth the money that they are appraised at, and that he returns them of, it is not to be supposed he can want buyers; and he is not charged to the value that they shall happen to be sold for, but to that value which he has returned; for if he return goods to value, and that they are rescued from him, he shall answer to the value returned. So here he shall answer for the value returned, and not to the value that they were sold for. When he seizes the goods by virtue of the writ, the defendant is actually discharged, though they are not sold; for the plaintiff must depend upon his execution, and rely upon that; and he has no farther remedy against the defendant, but altogether against the sheriff; and the defendant having lost his goods upon an execution, * which the plaintiff himself has chose, the goods are in the custody of the law, and the defendant discharged. The case of *Cleve v. Vere* (*c*) is not like this: The plaintiff after a writ of *extendi facias* dies, the sheriff takes an inquisition of the seizure into the king's hand, and then the administrator *de bonis non* comes into chancery, and prays a *liberate*: this came in question upon an ejectment brought by an administrator *de bonis non*, and it was held, that *the extent* was void; for the writ was abated, and no matter whether the plaintiff died before the return of seizure, or after; because no property is vested in him by the seizure,

CLERK against WITNESS.

1. Salk. 23.
5. Mod. 377.
3. Keb. 397.
Vide ante, 291, 292.

* [300]

Vent. 53.

Vide 2. Keb. 257.
1. Salk. 264. 322.
1. Mod. 5, 6.
Carth. 149. 290. 246.

(*a*) See Year-Book 34. *Hen.* 6. pl. 36. faur. Brev. 90. and the book called Brevia Judicialia.

(*b*) See Rastal's Entries, 164. The-

(*c*) Cro. Car. 450. 459. S. C. 1. Jones, 385.

Wesker against Wiseman.

seizure, but that only is in order to gain a property by a *liberate*; and there could be no *liberate* to him who sued the writ, because he is dead; and there is no more reason for an administrator *de bonis non* to have it, than if an executor had sued a *scire facias* to have execution of a judgment, and before the return of the writ, had died, and the administrator *de bonis non* should come for execution, which he could not have: but in this case there is no necessity for the plaintiff in the original action to come to the sheriff for execution. But in case there be no act of the Court to be done, but an *elegit* sued out, which commands the sheriff to deliver the lands extended to the party, if there the executor or administrator die after the inquisition, and before the delivery, in that case the death of the plaintiff shall not avoid the execution; and that appears by the case of *Harrison v. Bowden* (a), though not so very plain. So the sheriff seized the goods in the plaintiff's right as administrator, and by virtue thereof becomes responsible to him as administrator for the value which he himself has returned; and that right which he had, now comes to the administrator *de bonis non*; and therefore when the execution is compleatly executed, and the money brought into court, the administrator *de bonis non* may produce his administration, and the Court will thereupon let him take the money out of Court; and that is not by way of judgment. The sheriff by the writ is to take goods, and sell them in convenient time: indeed the not selling is not such a fault for which he may be amerced; but if a *distringas* upon his return go against him to THE CORONERS, if he continue sheriff, and do not sell between the *teste* and the return of the *distringas*, he shall forfeit issues: and after goods once seized, no writ of error or *supersedeas* shall stay the sale.

And so the judgment was affirmed by THE WHOLE COURT.

(a) 1. Sid. 29.

Case 387.

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* Cragger *against* Glover.

If a prisoner for debt be discharged under an insolvent debtor's act, and be afterwards taken again for above the sum mentioned in the act, he must find special bail. Vide ante, 22. 1 Salk. 521. Salk. 345. S. C. 3. Ld. Ray. 1088. S. C. 3. Salk. 56. S. C. 11. Mod. 36. 1. Ld. Ray. 383. 11. Mod. 2. 12. Mod. 513. 2 Ld. Ray. 1196. Stra. 1233.

ONE who had been in prison the eighth of *November* before for a debt under a hundred pounds, was afterwards in pursuance of the late act of parliament, upon summons to the creditor at whose suit he was in, discharged by the justices of peace, and afterwards was arrested for a sum above eight hundred pounds.

The doubt was upon the construction of the statute, Whether he should be held to *special bail*, or discharged upon *common bail*?

And upon a conference of all the other Judges, it was resolved he should be held to special bail. The doubt arose upon the words *any debt*. But then the PROVISO is, "that no person "shall be discharged out of prison by virtue of this act who shall

"stand charged and indebted in above one hundred pounds to any "person." Now some would have this applied to the first discharge, that is, the discharge by the justices of peace. But why not rather to the second discharge, or equally to both discharges? for he who is discharged upon an appearance is discharged, and by this act power is given to discharge them, if they be taken again; and then the proviso is, "that he shall not be discharged "if the debt be above one hundred pounds." So no man is to be discharged by virtue of this act that is charged with a debt of above one hundred pounds at the suit of one person. And he who is now arrested at the suit of one person is charged for a debt above one hundred pounds, therefore shall not be discharged by virtue of the act. As to the discharge upon *common bail* by virtue of the act, the Judges may do it as well as the justices of peace.

Chapman against Glover.

The Queen *against* Macarty.

Case 388.

Indictment for cheating a person of hats by making a false representation.

LONDON, } *to wit.* } THE jurors for our lady the queen upon their oaths present that *Matthew Macarty*, late of the parish of *St. Mary Le Bow*, in the ward of *Cheap* in *London* aforesaid, gentleman, and *Arthur Fordenborough*, late of the same place, gentleman, being greedy of dishonest gain, and wickedly, falsly, deceitfully, and maliciously intending to defraud *Thomas Choune* of *London*, haberdasher, of divers his goods and merchandizes (such a day, year, and place), together deceitfully bargained with the aforesaid *Thomas Choune* to barter, sell, and exchange, a certain quantity of pretensed wine, as good and true new wine of the kingdom of *Portugal* called *New Lisbon* wine, of him the said *Arthur Fordenborough*, for a certain quantity of hats, of him the said *Thomas Choune*, to the value of one hundred and eighteen pounds of good and lawful money of *England*: and upon the bartering, sale, and exchange aforesaid, he the said *Arthur Fordenborough* took upon himself to be a merchant of *London*, and to trade and merchandize as a merchant in wines of the kingdom of *Portugal*, and then and there personated a merchant of *London*, as if he had been a true merchant of *London*, when in fact he the aforesaid *Arthur Fordenborough* never was a merchant of *London*, nor did trade or merchandize as a merchant in wines of the kingdom of *Portugal*, or in any wine whatsoever as a merchant; and upon the bartering, sale, and exchange aforesaid, he the aforesaid *Matthew Macarty* took upon himself to be a broker of *London*, and did then and there personate a broker of *London* as if he was a true broker of *London*, when in fact he the aforesaid *Matthew Macarty*, at the time of the bartering, sale, and bargaining aforesaid, or at any time afterwards, was not a broker of *London*; and the aforesaid *Thomas Choune*, giving credit to the said fictitious assumptions, personatings, and deceits, did then and there barter, sell, and exchange, to the aforesaid *Arthur Fordenborough*, and did deliver to him the said *Matthew Macarty*, as the broker between

The Queen *against* Macarty.

tween the aforesaid *Thomas Choune* and *Arthur Fordenborough* for the use of him the said *Arthur Fordenborough*, a certain quantity of hats of the value of one hundred and eighteen pounds, for ——— hogsheads of the pretensed wine aforesaid; and that the aforesaid *Matthew Macarty* and *Arthur Fordenborough*, upon the bartering, bargaining, and sale aforesaid, did affirm that the aforesaid pretensed wine was true new wine of the kingdom of *Portugal* called *New Lisbon* wines, and was the wine of the aforesaid *Arthur Fordenborough*, when in fact the aforesaid pretensed wine was not wine of the kingdom of *Portugal*, nor was it drinkable or wholesome, nor was it the wine of the aforesaid *Arthur Fordenborough*, to the great deceit and damage of him the said *Thomas Choune*, and in contempt of the said lady the now queen, and of her laws, and against the peace of the said lady the now queen, her crown and dignity, &c.

Case 389. The Queen *against* Macarty and Others.

If two men under the *false pretence* of being, the one *a broker*, the other a *wine-merchant*, exchange a liquor which they affirm to be *New Lisbon wine*, with *a hatter* for *hats*, whereas in truth the liquor was, to their knowledge, only a mixture of *stale beer and vinegar*, it is an indictable offence.

S. C. 2. Ld Ray. 1179. Ante, 42. 61. 105. 147.

INDICTMENT was against them for an imposition put upon the prosecutor, and cheating him in a parcel of pretended *Port wine*.

Upon evidence the fact was, that one of the defendants, pretending himself to be *a broker*, and the other a *Portuguese wine-merchant*, came to the prosecutor being *a hatter*, and would bargain with him for a parcel of *hats*, and proffered him a parcel of *Portuguese wine* in exchange, and upon this prevailed with him to come and taste the said wine, which in truth was but *stale beer* mixed with vinegar, which notwithstanding the defendants affirmed to be *Portuguese wine*; and hereupon a bargain was struck, and hats to the value of one hundred and eighteen pounds delivered for so many pipes of the said pretended wine.

And here the prosecutor was the only witness, and he was allowed for a good witness by Holt, *Chief Justice*, because it was a cheat put upon his person; and he compared it to *Paris's Case*, in 1. *Sid.* 431. where, if the recognizance had been forged, the party himself could not be a witness, but may for a cheat put upon himself.

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Post. 311. 2. Hawk. P. C. c. 71. Com. Dig. "Indictment" (D.). Sid. 431. Keb. 572. Hard. 331. Vent. 49. 78. Sa. 8. 497. Sa. 1246. Burr. 1128.

* Several exceptions were taken to the indictment:

First, That it was laid, "that they deceitfully bargained to "barter, sell, and exchange, a certain quantity of *pretended wine* "as good and true *New Lisbon wine*, &c." whereas this is not *wine*, but all other liquor. It should have been, that they pretended this liquor to be *New Lisbon wine*, and pretending it to be such wine did deceitfully bargain to barter, &c.

Secondly, That it is laid, "that upon the bartering, selling, "and exchanging aforesaid, he the aforesaid *Arthur Forden*-"*borough assumpsit super se* to be a merchant of *London*, and

"dealing

"dealing and merchandizing as a merchant in the wines of the "kingdom of *Portugal*, and then and there personated a merchant "of *London at si esset* a real merchant of *London*, whereas in "truth, &c." and the *assumpsit super se* is improper, for that was, he *promised* and not *pretended*. The words "*at si*" are also improper, for they signify *but if*, which is nonsense: it should have been *ac si*, "as if."

The Queen *against* Macarty and Others.

Thirdly, It is laid *quandam quantitatem vini*, without shewing what quantity, or of what price; for which *vide* 2. *Lev.* 38. that the very sum taken in usury ought to be set down, and that it is not enough to say that he took above the lawful use.

Vide 1. Lutw. 465. 466.

Fourthly, It is not said that the defendants knew it not to be real wine; it only says that the *vinum pretensum* was not *vinum regni Portugaliæ*, and he cited the Year-Book of *Henry the Sixth* (*a*), and the case of *Rex v. Foster* (*b*).

Holt, *Chief Justice*. The crime is not the selling one thing for another, but here is *a false token*, the one pretending to be *a broker*, and the other *a merchant*, and a combination to cheat; but the exceptions seem weighty.

Ante, 42. 61. 105. 11. Mod. 222. 1. Salk. 125. 2. Salk. 445. Ld. Ray. 865. 890. 1013.

Et adjournatur.

And being moved again in Hilary Term, it was held, that *super se assumpsit esse mercatorem* was well enough, and the *at si esset* only surplusage.

But Holt, *Chief Justice*, thought the first exception fatal, for *vinum pretensum* may be *verum vinum*, and *pretensum* is not the contrary of *verum*, but *falsum*. And where Powell, *Justice*, thought *pretensum* and *falsum* to be the same, and quoted the statute of maintenance of *pretensed titles* to prove his opinion, Holt, *Chief Justice*, said, in that very case, the title of the disseisee, which without doubt is the true one, is called *pretensus titulus*, which shews *pretensus* and *verus* not to be contrary.

Et adjournatur (*c*).

(*a*) 9. *Hen.* 6. 53. p. 37.
(*b*) Trinity Term, 11. *Will.* 3.
(*c*) The case was argued again in Easter Term, the 4th of *Anne*, and in the Trinity Term following judgment was given for the Queen, the Court saying that the quantity was not necessary to be shewn, and that there was enough set out to shew the defendants to be cheats. S. C. Ld. Ray. 1184.

Scrimshaw *against* Westby.

Case 390.

Error of a judgment in the common-pleas, where it was declared, that in consideration that the plaintiff, at the instance of the defendant, would buy for the defendant *tanta pruna quant' in ea parte posset*, and bring them to *Billingsgate wharf* in *London*, he the defendant agreed to pay him eight shillings a bushel for *blue*

Error of judgment for plaintiff upon a promise to buy, &c. as many prunes as plaintiff could.

S. C. Ld. Ray. 1060.

prunes,

[illegible]es, and six shillings a bushel for *damsons*; that hereupon he bought such and such quantities of each, and brought them to the place ready to be delivered to the defendant, and tendered them, and that defendant did not receive them. Judgment was given for the plaintiff in the common pleas.

The error assigned was, that it was not averred that this was all he had, or could have bought.

But PER CURIAM, That need not have been said, for fruit are *bona peritura*, and to be sold immediately; and it was never the intent of the agreement that he should stay the delivery until he could

[303] have got together * all he could have bought. Besides, if this was not all he had bought or might have bought, as if he had bought any for others, that might have been insisted on at the trial, and upon *non assumpsit* the plaintiff must have proved his declaration.

And the judgment was affirmed, especially it being after verdict.

Case 391.

Villars *against* Cary.

Error upon a judgment in the palace court, &c.

Vide ante, 223. 1. Salk. 3.

ERROR OF JUDGMENT in THE PALACE COURT of *Westminster*. The plaintiff declared that the now-plaintiff became indebted to him by bond in the sum of one hundred and seven pounds *per nomen J. V. Vicecom' Purbeck et Domini Buckinghamiæ*.

The defendant, without craving *oyer*, pleads that he was truly indebted to the plaintiff in ninety-two pounds five shillings and nine-pence, and that by way of corrupt agreement for the forbearance of that sum for a year, this bond was given, &c.

The plaintiff replies, that it was *pro vero et justo debito*, and traverses the corrupt agreement.

To which defendant demurred specially, for the replication did not shew how much the just debt was.

Sed non allocatur. For there is enough to induce the traverse, and if it had been alledged, you could not have traversed the inducement; and the declaration sufficiently shews the debt (*a*). And if there be a just debt due, and a bond is given for the payment of it with unlawful interest, it is usury.

Vide 2. Salk. 451.

Then IT WAS OBJECTED, that the declaration was naught to say, that the defendant became bound *per nomen et cognomen J. V. Vicecom' Purbeck et Domini Buckinghamiæ*, the *Vicecom' Purbeck et Domini Buckinghamiæ* being titles, and no names, nor can they be understood to be his surname, for then they ought not to be put in Latin: and if one will become bound in such manner, the way to declare is by an *alias dictus*.

(*a*) 1. Cro. 609. Jones, 627.

Quod

Quod Cur' said to be the best way. But as to the objection the declaration, if you would take advantage of it, you should have craved *oyer* (*a*).

A THIRD OBJECTION was, that he declared *ad damnum* of two hundred pounds, and concludes, *unde petit judicium et damna sua præd.* when it should be *damna occasione detentionis debiti sui*; and we are upon special demurrer.

But PER CURIAM, It is no fault of form.

And let the debt be contracted where it will, and bond given for it within the jurisdiction of an inferior court, that gives them jurisdiction.

And the judgment was affirmed.

(*a*) Ante, 233. 2. Salk. 658. 701. Hole *v.* Finch, 2. Wils. 395.

Slater *against* May.

Case 39[illegible].

Declaration by an administrator during the absence of the executor, for money lent by the intestate.

3. D. 351. p. 4. 6. Mod. 304. 3. Salk. 23. Salk. 42.

LONDON, } BE it remembered, that heretofore, to wit, in the
to wit. } Term of *Easter* last past, before the lady the queen at *Westminster*, came *John Slater*, administrator of all and singular the goods, rights, and credits which were *Christopher Youlden's* deceased, at the time of his death, by *Thomas Moore* his attorney, and brought into the court of the said lady the queen then there, his certain bill against *John May*, in the custody of the marshal, &c., of a plea of trespass upon the case; and there are pledges of prosecuting, namely, *John Doe* and *Richard Roe*, which said bill followeth in these words, that is to say, *London*, to wit, *John Slater*, administrator of all and singular the goods, rights, and credits which were *Christopher Youlden's*, deceased, at the time of his death, complains of *John May*, in the custody of the marshal of the *Marshalsea* of the lady the queen, before the queen herself being, for that, to wit, that whereas the aforesaid *John May*, on the twenty-third day of *January*, in the year of Our Lord one thousand six hundred and ninety-nine, at *London*, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, was indebted to the said *Christopher*, in his life-time, in thirty pounds of lawful money of *England*, for so much money of the same *Christopher*, in his life-time, by him the said *Christopher*, in his life-time, to the said *John May*, at the special instance and request of him the said *John May*, before that time lent and accommodated; and being so thereupon indebted, he the said *John May*, in consideration thereof, afterwards, to wit, the same day and year abovesaid, at *London* aforesaid, in the parish and ward aforesaid, took upon himself, and then and there faithfully promised the said *Christopher*, in his life-time, that he the said *John May* would well and faithfully satisfy and pay the aforesaid thirty pounds to the same *Christopher*, when afterwards he should be thereunto requested: and whereas also the aforesaid *John May* afterwards,

to

to wit, the same day and year abovesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *Christopher* in his life-time, in other thirty pounds of like lawful money of *England*, for so much money of him the said *Christopher*, in his life-time, by the said *John May*, for the same *Christopher*, and to the use of him the said *Christopher*, before that time had and received; and being so indebted, the aforesaid *John May* afterwards, to wit, the same day and year abovesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration thereof, took upon himself, and then and there faithfully promised the same *Christopher*, in his life-time, that he the said *John May* would well and truly pay and satisfy the said thirty pounds last-mentioned, to the said *Christopher*, when he should be thereunto afterwards requested: nevertheless, the said *John May*, his several promises and undertakings aforesaid, in form aforesaid made, not regarding, but contriving and fraudulently intending in this behalf craftily and subtilly to deceive and defraud the said *Christopher*, in his life-time, and the said *John Slater*, after the death of the said *Christopher*, of the said several sums of money (to which said *John Slater* administration of all and singular the goods, rights, and credits, which were the aforesaid *Christopher Vauman's*, at the time of his death, with his will annexed, for the use and benefit, and during the absence of *Elizabeth Vittery*, the executrix named in the said will, by *Thomas*, by divine providence, archbishop of *Canterbury*, primate and metropolitan of all *England*, on the fifteenth day of *October*, in the year of Our Lord one thousand seven hundred and three, at *London* aforesaid, in the parish and ward aforesaid, were in due form of law committed), hath not paid the said several sums of money, or any part thereof, to the said *Christopher*, in his life-time, or to the said *John Slater*, after the death of him the said *Christopher*, nor hath hitherto, in any manner, contented them for the same (although to do this, the aforesaid *John May*, by the said *Christopher*, in his life-time, and by the said *John Slater* after the death of the said *Christopher*, and the committing of the administration aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was requested); but altogether refused to pay, or in any manner to satisfy the same unto the said *Christopher* in his life-time, and yet refuseth to pay them to the said *John Slater*, to the damage of him the said *John Slater* of forty pounds: and thereupon he brings suit, &c. And the said *John Slater* brings here into court the said letters of administration aforesaid of the said archbishop, which testify the commission of the administration aforesaid to the said *John Slater*, in form aforesaid, the date whereof is the same day and year, in that behalf above-mentioned, &c.

Another indebitatus assumpsit for money had and received to the intestate's use.

Breach.

Letters of administration set forth.

Request.

And now at this day, to wit, *Friday* next after the morrow of the *Holy Trinity* in this same Term, until which day the said *John May* had leave to imparl to the aforesaid bill, and then to answer, &c. before the lady the queen at *Westminster*, comes as well

well the said *John Slater* by his said attorney, as the said *John May* by *Richard Gates* his attorney: and the same *John May* defends the force and injury, when, &c. and saith that the declaration aforesaid, and the matter therein contained, are not sufficient in the law for the said *John Slater* to have and maintain his said action thereupon against him the said *John May*; and that he hath no need, nor is bound by the law of the land, in any manner to answer the said declaration, in manner aforesaid declared: and this he is ready to verify: wherefore for defect of a sufficient declaration in this behalf, the said *John May* prays judgment, if the said *John Slater* ought to have his said action against him the said *John May*, &c. And for causes of demurrer in law in this behalf, the same *John May*, according to the form of the statute in such case lately made and provided, sheweth and pointeth out to the Court here these causes following, to wit, that the declaration aforesaid is altogether uncertain, double, insensible, insufficient in law, and wants form, &c. And the aforesaid *John Slater* saith, that notwithstanding any thing by the said *John May* above alledged, the declaration aforesaid of the said *John Slater* ought not to be quashed, because he saith that the declaration aforesaid, and the matter in the same contained, are good and sufficient in the law for him the said *John Slater* to have and maintain his said action thereon against him the said *John May*: which said declaration, and the matter in the same contained, the said *John Slater* is ready to verify and prove as the Court, &c. And because the aforesaid *John May* hath not answered to that declaration, nor hath hitherto any ways contradicted it, the said *John Slater* prays judgment and his damages by occasion of the premises to him to be adjudged, &c. But because the Court of our said lady the queen now here, are not yet determined of giving their judgment of and concerning the premises aforesaid, a day therefore is given to the aforesaid parties before the lady the queen at *Westminster*, until ——— day next after ——— of hearing their judgment of and concerning the said premises, for that the Court of the said lady the queen here thereof not yet, &c.

Slater against May. Demurrer to declaration. Joinder.

*[304]

* Slater *against* May.

Case 393.

DEBT by an administrator *durante absentiâ* (a) of *A.* who is an executor, shewing, that administration was committed to him *debita legis forma*, without shewing that at the time of administration committed he was absent beyond sea, or that the absence continued.

In debt by administrator *durante absentia*, it must be shewn that the executor was absent beyond sea.

S. C. 1. Salk. 42. S. C. 3. Salk. 23. S. C. 2. Ld. Ray. 1071. N. Lut. 102. 1. Rol. Abr. 910. Godolph. 136. 2. Brown. 83. 1. Cro. 244. Cro. El. 602. Fitzg. 202. 257. Ld. Ray. 338. 409. 667. 685. 824. 1072. 1216.

(a) For executors *durante minoritate*, see 1. Mod. 62. 174. 2. Saund. 148. 2. Lev. 37. Cro. Car. 240. God. 104. Yelv. 130. 5. Co. 29. 5. Mod. 395. Comb. 475. NOTE *to former Edition*: see also 1. Com. Dig. "Administration" (F.)

And

And PER CURIAM, It is reasonable THE ORDINARY should have power to commit administration *during absence* of an executor beyond sea, and such administrator to be accountable to the executor; and when they say, tnat it is *debita legis forma durante absentiâ*, we must understand it an absence beyond the sea. *Vide* 1. *Lutw.* 342. *Clare v. Hodges.* But the same case in 4. *Mod.* 14. is not law, nor agreeable to the ROLL. But surely it ought to be averred that the absence continues, according to *Pigot's Case* (*a*); and so in case of an administrator *pendente lite* (*b*), and so in all like cases.

And judgment was given for the defendant.

(*a*) 5. Co. 29. (*b*) 3. Keb. 212.

Cholmley *against* Veal.

SCIRE FACIAS against the bail, who plead no *capias* against the principal. In replication *a capias* is set forth, and *non est inventus* returned upon it, which appeared to be *tested* a year after the judgment.

PENGELLY. To charge the bail there ought to be *a capias* legally sued out (*a*); and this appearing to have been sued out after the year, and no *scire facias* appearing, must be looked upon as illegal. *Ideo, &c. Vide Lutwyche's Rep.* 1283. *Redman v. Idle, &c.* and 3. *Keb.* 671.

HOLT, *Chief Justice.* The plaintiff intitles himself to recover against the bail upon a breach of the recognizance, which is, that he shall answer the condemnation, or render the principal at the proper time; and the breach is assigned, and *a capias* set forth to have been taken out and returned; and what need has he to take notice of a *scire facias*? for the bail are strangers to the record, and cannot take advantage of error in it. There not being a *scire facias* previous to the *capias* taken out after the year is but error at the best, of which bail cannot take advantage; and if it had actually appeared to us that there was no *scire facias*, I question whether it would have been any thing more than error, and so not available to the bail; but if it were actually void, still it ought to come on the bail's side. The plaintiff, in intitling himself against bail, never mentions any thing of the *capias*. You come and admit all that intitles him to his *scire facias* against you, *viz.* the non-payment of the condemnation, and non-rendering the * principal; but you say that there was no *capias*, which is to say that his time to render was not yet come: and what has the plaintiff to do but to shew that there was *a capias*. The *capias* which the

(*a*) Therefore the Court will set aside proceedings against bail, if the *capias ad satisfaciendum* be *tested* of a Term prior to that in which judgment is signed against the principal. Gawler *v.* Jolly, C. B. Mich. 29. Geo. 3. 1. H. Bl. Rep. 75.

shew*

shews may be irregular; it may be so; but we shall not intend it ill until you shew it so. There is full title made for the plaintiff, and your plea is only an excuse that there was no *capias*; and the reason of it is, that I am not bound to render the principal until I know what execution the plaintiff will chuse (*a*), whether he will chuse to have his body, which he makes appear by suing a *capias*; for he might have sued an *elegit*, or *fieri facias*. 12. Mod.

And BY THE WHOLE COURT judgment was given for the plaintiff.

If the defendant die after *capias* and before return of it, bail is discharged: *per* JONES, 1. *Jo.* 136.

(*a*) Ante, 257. 1 Jones, 139. Lutw. 1273. 1. Wilf. 334. 2. Wilf 65. Dougl 58.

Thornborough *against* Whitacre. Case 395.

Assumpsit lies on a promise to deliver a grain of rye on Monday, and an additional two grains, in arithmetical progression, on every Monday during the year; but the jury may give such damages only as they think reasonable.

S C 2. Ld. Ray. 1164.
S C. 3. Salk.
1. Jo. 138.
1. Vent. 267.
1. Keb. 569.
1. Lev. 111.
Mathesin Wallis, ff 1. cap.
1. Wilf. 295.
2 Bac. Ab.

ASSUMPSIT, That in consideration of half a crown by the plaintiff in hand paid to the defendant, he promised to pay two grains of rye upon *Monday* the twenty-ninth of *March* in such a year, four grains the next *Monday* after, and so on by progressional arithmetick every *Monday* for a year; and . . *assumpsit* pleaded.

PER CURIAM, upon motion: Let them go to trial; and though this would amount to a vast quantity, yet the jury will consider of the folly of the defendant, and give but reasonable damages against him (*a*).

(*a*) This came before the Court on a demurrer to the declaration, and the Court was of opinion that the action would lie; but the defendant, perceiving the opinion of the Court to be against him, offered the plaintiff his *half-crown* and costs, which was accepted of, and so no judgment was given in the case. S C. 2. Ld Ray. 1166 —In *assumpsit* to pay for *a horse* a barley-corn a nail, doubling every nail, it was averred in the declaration that there were thirty-two nails in every shoe, which, doubling every nail, came to 500 quarters of b . . y; and HYDE, *Chief Justice*, directed the jury to give the value of the horse in damages, and they gave eight pounds, and held good, James *v* Morgan, 1. Lev. 111. for a catching bargain shall not be taken advantage of, Lord Chesterfield *v* Jansen, 1 Wilf 295 and giving him the value of the horse was giving him all that he was in reason and justice intitled to, and to that he was intitled, as the defendant had no right to have the horse for nothing. 2. Bac Ab 4 . . .

Phips *against* Jackson. Case 396.

There are ways of pleading privilege: 1st, which ... of the ... and 2dly, as matter of fact. 2 Salk. 543 Ante, 26. 106. 114. 1 Jones, 289. 1. Vent. 264. 1. Ld. Ray. 7. Mod. 106, Tidd's Pract. 51.

IT was pleaded in *abatement*, That *tempore quo memoria non extat* all *the clerks* of the queen's COURT OF EXCHEQUER were privileged from being sued elsewhere than in that court; and that the defendant was clerk to *R. P.* one of the barons of our exchequer aforesaid.

And

Parry against Jackson.

And upon demurrer,

PER CURIAM: There are two ways of pleading of *a privilege*.

One is to go to issue, and at the trial, if the party be an officer of record, to shew it by producing the record; if he be not an officer of record, but is attendant to one of the barons, that must of necessity be tried by a jury, because the court of exchequer, as a court, cannot take notice of it no more than we.

The other way is, if he be an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no issue can be joined upon it.

Immemorial custom how pleaded. Co. Lit. 115.

And here the custom is ill pleaded, for *tempore quo non extat memoria* is nonsense, and should be *cujus contrarii memoria non, &c.*

But he having shewed that he is one of the clerks of A BARON, and insisting upon privilege, ought not we to take notice that he ought to have privilege?

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Plea here ill for want of averment, &c. Ante, 105. Vide 3. Mod. 216. 2. Lev. 50. 88. Vide ante, 3. 223. Ld. Ray. 13. 337. 532. 635. 673. 704. 869. 898. 1173. 1208. 1524. 1556.

* To which it was answered, that he did not aver that he was clerk to one of the barons of the queen's chequer, but *de scaccario nostro*; and for that a *respond' ouster* was awarded.

Case 397. Michell *against* Waldron.

A misprision of the clerk in a *writ of inquiry* in common pleas, may be amended in the king's bench, and the Court will order THE ROLL to be brought in. Ante, 270. 272. Cro. Jac. 372. 2. Roll. Rep. 408. 3. Mod. 112. 8. Mod. 304. 1. Com. Dig. "Amendment" (S.). Comy. 580.

WRIT OF ERROR of a judgment in the court of common pleas. The error assigned was, that the award of the *writ of inquiry* was, "*Ideo præceptum est vic' London. quod inquirat*," in the *singular number*, and so all along in the *singular number*.

The question was, Whether this be amendable in this court, so as to save the defendant the costs which he must pay upon an amendment in the common pleas? And the cases of *Lewson v. Redleston* (*a*) and *Wolley v. Moseley* (*b*) were quoted for such amendments here; the case in *Ventris* (*c*) was allowed by the Court.

But THE COURT seemed to incline that they could not amend, this being the award of the Court; but would consider.

And in *Hilary Term* THE COURT said, it was only a mistake of the clerk; for the courts of *Westminster* do take notice that there are two sheriffs in *London*.

(*a*) Cro. Eliz. 677. 709.
(*b*) Cro. Eliz. 760.
(*c*) 2. Vent. 171. See also Walker *v.* Riches, Cro. Eliz. 162. and Rea *v.* Gwynn, Hob. 90.

But

But because the Court cannot amend without having something to amend by, HOLT, *Chief Justice*, ordered the officer of the court of common pleas to attend with THE ROLL in order to make the amendment.

MICHELL *against* WALDRON.

Woodcock *against* Morgan. Case 398.

DEBT upon a bond, shewing that on such a day the defendant became indebted to the plaintiff *per scriptum suum obligatorium*, without shewing the date of the bond, or saying that it was sealed and delivered.

In debt on bond "*per scriptum* "*obligatorium*" is sufficient, without mentioning date, seal, or delivery. Cro. Car. 209.

PER CURIAM. Becoming indebted *per scriptum obligatorium* is enough.

3. Lev. 234. Cro. Eliz. 737. Cro. Jac. 420. Lutw. 1667. 1. Salk. 473. 4. Co. 65. Ld. Ray. 336. 703. 1043.

But the plaint being, "*Woodcock* complains of *Morgan*, &c. of a "plea that he render to him sixty pounds of lawful money, &c." without saying "which he owes to him and unjustly detains, &c." it was held ill.

Debt on bond, omitting "*quas* "*ei debet*, &c." is bad. 1. Lev. 130. 224. 1. Sid. 342.

The Queen *against* Buck and Hale. Case 399.

THE defendants were found guilty upon an indictment for a misdemeanour, for that being collectors and assessors of the public taxes in such a parish, they assessed and rated som. at too high a rate, and omitted to tax some others in their books, and yet levied the taxes upon them, and put the money in their own pockets. And now coming to receive judgment,

Assessing and levying taxes unfairly for sinister purposes is an indictable offence, and punishable by pillory.

MONTAGUE urged, that it being no offence of an infamous nature, as *perjury* or *forgery*, nor against the publick, there ought not to be any corporal punishment, as pillory.

1. Salk. 380. 11. Mod. 53. 79. 137.

* PER CURIAM. It is an offence of dangerous consequence, and very pernicious to the Government, of very ill example, and too much practised of late; for what greater discouragement can there be to the people to pay their taxes freely, than to have injustice and inequality of rates for the private advantage of some? and therefore this offence deserves an exemplary punishment.

Vide ante, 234. 1. Cro. 332. Cro. Jac. 65. Noy. 102. Mo. 781. 3. Inst. 145. 1. Leon. 295.

And THEY WERE ADJUDGED to *the pillory* in the county where the fact was committed; and THE MARSHAL was ordered to carry them down, and a writ was issued to the sheriff of the county to assist him in the execution.

* [307]

Case 400. The Queen *against* The Inhabitants of the County of Wilts.

The sessions cannot make *an order* for the repair of a highway; for they have no jurisdiction but on *presentment*. S.C. ante, 191. S.C. 1. Salk. 359. S. C. 3. Salk. 381. S. C. Holt, 339. 12. Mod. 13. 198. Ld. Ray. 725. 792. 804. 856. 1175. 1249. 1169. 1. Bac. Abr. 329.

UPON debate on a motion for *a new trial*, where the issue was, Whether THE COUNTY of *Wilts* at large, or THE TOWN of *L.* within the county, was obliged to repair the bridge of *L.* in that county? an order of sessions, formerly made upon the inhabitants of *L.* to repair, was offered in evidence for *the county* at the former trial; and rejected upon this reason, that the justices of peace have no jurisdiction over highways but upon A PRESENTMENT, and none had been to warrant this order.

It was declared BY THE COURT,

The admission of bad, or the rejection of good evidence, is a ground for a *new trial*. Comy. 601. 1. Peere Wms. 212. Stra. 642. 1105. 1142. Ld. Ray. 62. 148. 1359. Ante, 18. 22. 242. 5. Com. Dig. "Pleader" (R. 17.).

FIRST, That it is a good cause to grant *a new trial*, that the Judge who tried the cause over-ruled good, or admitted that which was no evidence, and that although the other party has a remedy by *bill of exception*.

Inhabitants cannot change the situation of a bridge, &c.

SECONDLY, That the inhabitants of the whole county cannot of their own authority change the bridge or highway from one place to another; for it cannot be without act of parliament (*a*).

The county of common right bound to repair bridges. 1. Salk. 12. Vaugh. 341. Cro Car. 266, 267.

THIRDLY, The county of common right are bound to repair public bridges; but a particular person, town, &c. may, for a special cause, be bound to repair them, as by tenure, prescription, &c. (*b*).

A private bridge dedicated to the publick shall be repaired by the county.

FOURTHLY, If a private person build a private bridge, which afterwards becomes of public convenience, the whole county is bound to repair it (*c*).

Indictment of a county shall be tried in the next adjacent county.

FIFTHLY, This matter concerning the whole county, suggestion may be of any other county's being next adjacent, and *the venue* shall come from thence for the necessity of an indifferent trial (*d*).

(*a*) 2. Inst. 701. But see the statutes 1. *Ann.* st. 1. c. 18. the 12. *Geo.* 2. c. 29. s. 13. and the case of the King *v.* Justices of Glamorganshire, 5. Term Rep. 282. 1. Hawk. P. C. c. 77. 1. Bac. Abr. 330.

(*b*) 2. Lev. 112. Poph. 192. 1. Hawk. P. C c. 77. s. 4.

(*c*) See this point adjudged in the case of the Inhabitants of the West Riding of Yorkshire, 2. Bl. Rep. 685. and S. C. 5. Burr. 2594.

(*d*) See 2. Burr. Rep. 859.

SIXTHLY,

SIXTHLY, One of the county is a good *witness* in the case, though not a good *juror* (*a*).

Inhabitant is a good *witness*, but a bad *juror*.

And at last a rule by consent was made.

And by HOLT, *Chief Justice*, If it be not obeyed, *an attachment* may go against the inhabitants of the whole county, and catch as many as one can of them.

A county may be *attached* for disobeying a *rule of court*.

(*a*) By 1. *Ann*. st. 1. c. 18. s. 13. "In all informations or indictments the "evidence of the inhabitants of the town, "corporation, county, riding, or divi-"sion, in which the decayed bridge or "highway lies, shall be admitted."

*[308]

* Treil *against* Edwards.

Case 401.

PER CURIAM. If an executor suffer judgment to go against him by default upon executing a *writ of inquiry*, he shall not give evidence of want of *assets*, for he is estopped, as if it had been the case of *an heir*; for he should have pleaded *plene administravit* (*a*), or specially what *assets* he has (*b*).

If an executor suffer judgment to go by *default*, it is an admission of *assets*.

1. Jones, 87.

Cro. Eliz. 102. 2. Stra. 1075. 5. Com. Dig. Pleader" (Z.3.)(2.D.9.).

(*a*) 3. Term Rep. 685. (*b*) See Skelton *v*. Hawling, 1. Wils. 258. *accord*.

Anonymous.

Case 402.

A CITATION was in the consistory court of ——, and a prohibition was moved for upon three several points:

A prohibition cannot be granted for the double count of *denying copy of the libel* and on *the merits*; but it may be granted on the first count, *quousque*; and when that is discharged by receiving the copy, a prohibition may be granted on the *merits*.

FIRST, That they refused a copy of the libel.

SECONDLY, That the citation was, *profanatione cœmeterii* of such a church; and that the supposed profanation was by the party as coroner, in the duty of his office, in digging a corpse for a view

THIRDLY, That the said church was within such *a peculiar*, and consequently not within the jurisdiction of the consistory court, not even by letters of request: and for authority for prohibitions upon the third point were quoted *Latch*, 180. *Noy*, 89.

HOLT, *Chief Justice*. Your suggestion contains two matters that ought not to go together: the one, the denial of the copy of the libel; and the other upon the merits; for they are grounds for prohibitions of different natures: the first, for a prohibition only *quousque*, which is *ipso facto* discharged by granting a copy of the libel (*a*) without writ of consultation; the other, *a peremptory prohibition*, which ties them up till *a consultation*, and upon such a suggestion we ought not to grant a prohibition. Indeed, if a prohibition until they give copy of the libel, be granted before

S. C. Holt, 529. 1. Salk. 190. 377. 7. Mod. 10. Ld Ray. 442. 991. 6. Com. Dig. "Prohibition" (F. 15.)

(*a*) Year-Book 4. *Edw*. 4. pl. 37. b. Salk. 553. Hardres, 364. Ante, 87. 1. Vent. 5.

ANONYMOUS. any libel exhibited, it does not bind them from exhibiting a libel; but afterwards they shall not proceed until they give a copy of it; and then, to have a prohibition upon the merits, you must make a new suggestion.

Vide 1. Cro. 340. 3. Cro. 102. 1. Salk. 40, 41. 3. Lev. 193.

And as to THE THIRD POINT, all *peculiars* are not inferior to THE ORDINARY of the diocese in which they are; and such as are not, cannot transmit any cause to the ordinary, and such transmitting must always be to the immediate superior. The *dean and chapter of Salisbury* have a large peculiar within the limits of the diocese, but as much out of the jurisdiction of the diocese of *Salisbury* as the diocese of *London* is. The peculiar jurisdiction of an archdeacon is not properly a peculiar, but rather a subordinate jurisdiction (*a*). The remission of the cause must be to that jurisdiction to which the appeal would lie in case the cause had not been remitted. A peculiar *primâ facie* is to be understood of him who has co-ordinate jurisdiction with the bishop; and therefore it would be improper to determine what sort of peculiar this is, upon motion. If your suggestion were right, it were fit for a prohibition, that the matter might come in debate on a declaration therein.

(*a*) Hob. 185, 186.

* [309]

Case 403. * The Queen *against* the Mayor of Hereford.

An argumentative return upon a *mandamus* is ill. S.C 2. Salk. 701. Ante, 89. 2. Salk. 430. 432. 434. 436. 10. Mod. 101. 374. 12. Mod. 2. 113. 401. Ld. Ray. 1244. 1267. 1304. 1379. 1405. 5. Com. Dig. "Mandamus" (D 5.).

MANDAMUS to him to swear such a one into the place of *town-clerk* of *Hereford*, and the return was, that upon election *B.* had eighteen voices, and the party who sued the *mandamus* but seventeen, and that they swore in *B.*

PER CURIAM. It is a bad return, because it is argumentative, when it should be express and direct that he was not chosen (*a*): and the case in *Sir Thomas Jones* (*b*) was said by HOLT, *Chief Justice*, to be a strange case, and contrary to subsequent resolutions; but if the mayor had returned an election *de facto*, and that the party had given a bribe to get himself chosen, it had been something.

(*a*) See Rex *v.* Mayor of Doncaster, 2. Burr. Rep. 738. Rex *v* Lyme Regis, Dougl 181. and Rex *v.* Mayor of York, 5. Term Rep. 66. See 1. Keb. 660. 716. 1. Sid. 209. (*b*) 2. Jones, 177, 178.

Case 404. Bernardiston *against* the Sheriff of Middlesex.

A misnomer in a bail-bond and *reddidit se*, variant from the first writ, cannot be amended. Mor, 407. Barnes, 116. 1. Bac. Abr. 216.

THE plaintiff took out a writ against *J. S.* and delivered it to the defendant to be executed: upon the arrest, the bail-bond by the officer was to appear at the suit of *Bernadistant*, and bail was put in by that name, and afterwards a *reddidit se* by the same name; and the plaintiff sued the sheriff for escape.

MONTAGUE

MONTAGUE moved, that the *bail-piece* and the *reddidit se* might be made according to the writ.

PER CURIAM, It cannot be; for *the bail* must be according to the *bail-bond*, and not according to *the writ* or the return of it: and though it be *vitium scriptoris* in the bond, yet we cannot help it.

BERNARDISTON *against* THE SHERIFF OF MIDDLESEX.

Anonymous.

Case 405.

In ejectment, the attorney is liable to costs where the plaintiff is nominal.

PER CURIAM. It is a great abuse, in ejectment, that people make *nominal lessees* persons not *in rerum naturâ*, or at best not known to the defendant; so that he thereby may lose his costs.

And PER OMNES, The attorney that does so ought to pay costs.

And in this case an attorney was put to answer interrogatories for such a practice.

12. Mod. 318. 445. 656.

Ante 130. 222. Carth. 3. 204. 277. 288. 391. 2. Lev. 66. Run. Eject. 143. Stra. 402.

Dean *against* Crane.

Case 406.

An *old debt* is revived by a *new promise* made after the expiration of *six years*; but *owning* the debt is not sufficient.

A NOTE had been made by the defendant to the plaintiff's testator, above six years before the action brought, for payment of money.

Upon *non assumpsit infra sex annos*, at the trial before HOLT, *Chief Justice*, the plaintiff gave evidence of a promise made to himself after the arrest and before the bill exhibited.

The question was, Whether this evidence maintained the declaration?

And the case of *Heylin v. Hastings* was remembered, wherein, upon conference with ALL THE JUDGES OF ENGLAND, it was held, that a * promise after the six years brings the matter out of the statute of Limitations; that *owning* the debt does not go so far; but that is evidence of a promise (*a*).

S.C. 1. Salk. 28. Ante, 25. 240. 2. Vent. 151. 10. Mod. 314. 12. Mod. 223. 444. * [310] 2 Peer. Wms. 573. 3. Peer. Wms. 94. 143. Comy. 54. 2. Burr. 738. Bull. N. P. 149.

(*a*) But it seems to be now settled, that an *acknowledgement* of the debt, even after the commencement of the action, will take it out of the statute of Limitations, Yea v. Fouraker, 2. Burr. 1099. and the slightest acknowledgement has been held sufficient; as saying, "Prove "your debt, and I will pay you," Heylin v. Huskins, Salk. 29.; or, "I am ready "to account, but nothing is due to you," Cowp. 548. and even a much slighter acknowledgement than these is said to be sufficient, Cowp. 548. What is an *acknowledgement*, is matter for the consideration of a jury. Lloyd v. Maund, 2. Term Rep. [illegible] But although *a promise* is not necessary to take the demand out of the statute, yet the declaration must amount to the acknowledgement of *a debt*; and therefore where a person sued by an executor said, "I acknowledge the "*receipt of the money*, but the testatrix *gave* it me," CLIVE, *Baron*, held it not sufficient, Owen v. Wolley, Bull. N. P. 148.

Promise to a testator is not proved by a promise to his executor.

NOTE, Here the declaration was on a promise made to the testator, and the promise given in evidence was to the executor.

THE COURT said, that here the executor might declare of a promise to himself.

But *adjournatur.*

And in *Hilary Term*, upon conference with ALL THE JUDGES, it was held, the evidence did not maintain the declaration.

Case 407. Anonymous.

Filling up a writ after it is sealed, is *a contempt.*

Dyer, 241. 244. Savil, 31. Ante, 16. 2. Hawk. P. C. ch. 22. f. 43. Cowp. 9. 2. Bl. Rep. 823. 2. H. Bl. Rep. 29.

PER HOLT, *Chief Justice.* It is illegal to fill up a writ after it is sealed; and whoever is arrested by virtue of such a writ has an advantage.

But *quære* PER ME, if it be false imprisonment, or to be relieved on motion.

Case 408. Peat's Case.

A *mandamus* lies to admit a teaching dissenter to qualify himself.

S. C. ante, 228. S. C. 2. Salk. 572. Stra. 58. 4. Burr. 1991. 1. Bl. Rep. 300.

KING moved for *a mandamus* to the justices of the sessions of the county of *Warwick*, to admit *Peat* to take the oath of allegiance, and to subscribe according to the act of Toleration, in order to be qualified to teach a dissenting congregation.

And it was granted (*a*).

On a *mandamus* to be admitted, a title must be shewn.

5. Mod. 420. 3. Term Rep. 275. B. R. H. 362. 5. Com. Dig. "Mandamus" (C. 3.).

HOLT, *Chief Justice.* The party ought to suggest whatever is necessary to entitle him to be admitted; and if that be not done, or if it be done and the fact be false, that will be good matter to return.

(*a*) See Rex *v.* Justices of Derbyshire, 1. Bl. Rep. 606. 2. Burr. 1043. 1. Hawk. P. C. 7th edit. ch. 16. f. 31.

Case 409. Williams *against* Hoskins.

If there be judgment in ejectment for two messuages, a *scire facias* to revive it, reciting by mistake a judgment for *one messuage* only, cannot be amended; but the plaintiff may take out *a new writ.* S. C. ante, 263. S. C. 1. Salk. 52. S. C. 3. Salk. 32. S. C. Holt, 58. 763. S. C. 2. Ld. Ray. 1057. Ante, 284. 286. Carth. 70. 76. 367. 520. 11. Mod. 263.

JUDGMENT was given in ejectment for *two messuages*, and after a year a *scire facias* upon it recited a judgment of *one messuage* only; and to this *nul tiel record* was pleaded.

It was moved to amend it.

But

But PER CURIAM, It cannot be; for this is a good writ for any thing that appears on the face of it; and for that, if there were a judgment for one messuage, this writ would be a good writ to revive; so being good in itself, though not opposite to this purpose, to amend would be to make a new writ, or to alter a good writ and fit it to another purpose. To amend this writ would falsify the defendant's plea, which was good at the time when it was pleaded; and that this ought not to be, the case of *Napiere v. Sir John Germaine* (a) was quoted, where, after *misnomer* pleaded, the Court refused to amend, because it would falsify the plea: but if the fault had appeared in the very writ, it might be amended (b). WILLIAMS *against* HOSKINS.

And *tandem* the plaintiff for his expedition took another writ.

And PER CURIAM, That he might do without getting this quashed; for if this writ abate, then it is not the same cause.

(a) Hob. 117.

(b) So now by 5. *Geo.* 1. c. 13. " A " variance from the original record, or " other defect in a writ of error, shall be " amended and made agreeable to the " record by the Court where the writ is " returnable." See Fitzg. 201. 268. Stra. 807. 863. 2. Ld. Ray. 1531. Cowp. 425. 1. Com. Digest, " Amendment" (2. Ç. 4.)

* [311]

* Linch *against* Hooke. Case 410.

SHE was arrested by the name of *Minors*, and gave a bail-bond by that name, and now would plead *misnomer*.

PER CURIAM. If one be arrested by a wrong name, and brought into court, he may plead *misnomer*: and if a *feme covert* be arrested by a wrong name, and give a bail-bond, yet she may plead the *misnomer*; for her bond being that of a *feme covert*, she may plead *non est factum* to it; therefore it will not estop her.

A *wife*, after bail-bond given, may plead *misnomer*, &c. S. C. ante, 225. S. C. 1. Salk. 7. Ante, 154. Vent. 13. Cro. Eliz 108. 249. 583. 2. Bl. Rep. 1082.

The Queen *against* Hannon. Case 411.

HANNON was indicted, for that being a *communis deceptor* of the queen's people, he came to the wife of *B.* and made her believe that he had sold part of a ship to her husband, and upon that account got several sums of money from her.

BY THE COURT,

FIRST, " *communis deceptor*" is too general, and so is " *communis oppressor*," " *communis perturbator*, &c." and so of all other (except *barretor* (a) and *scold* (b), without adding of particular instances.

An indictment that *A.* being a common cheat, &c. is too general. Ante, 42. 61. 182. 301. 1. Salk. 379. 1. Sid. 282. 1. Lev. 299. 1. Mod. 71. 288. Stra. 849. 1246. 3. Burr. 2471.

(a) Cro. Jac. 527. 1. Sid. 282. Strange, 181.

(b) See 1. Hawk. P. C. ch. 75. s. 5.

A fraud of a private nature, effected by a naked lie, is not indictable.
Burr. 1125.
1. Bl. Rep. 273.

SECONDLY, The particular instance alledged here, is of a private nature: if he had made use of any *false token*, it would have been otherwise.

And THE COURT ordered the indictment to be quashed.

1. Hawk. P. C. ch. 71.

Case 412.

Tenant *against* Goldwin.

Special action on the case for not repairing a partition wall, whereby the plaintiff was injured.

MIDDLESEX, } BE it remembered, that heretofore, to wit, in *to wit*, } the Term of *Easter* last past, before the lady the queen at *Westminster*, came *Robert Tenant* by *John Rice* his attorney, and brought into the court of the said lady the queen then there, his certain bill against *Luke Goldwin*, in the custody of the marshal, &c. of a plea of trespass upon the case; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit, *Robert Tenant* complains of *Luke Goldwin*, being in the custody of the marshal of the *Marshalsea* of our lady the queen, before the queen herself, for that, to wit, that whereas he the said *Robert*, on the first day of *October*, in the first year of the reign of the lady *Ann*, now queen of *England*, *&c.* and from thenceforth always until this time was possessed, and as yet is possessed of one messuage situate lying and being in *Frith-street*, in the parish of *Saint Ann*, within the liberty of *Westminster*, in the county of *Middlesex*, for a certain term of years not yet ended, and used to place and keep in his cellar parcel of his messuage aforesaid, stores of coals and ale for the use of his family, and also to be sold and merchandized to divers persons who used to buy of him the commodities aforesaid, in his messuage aforesaid, to the great profit and advantage of him the said *Robert*, which said cellar lies contiguously, and for all the time aforesaid did lie contiguously, to a messuage of the aforesaid *Luke*, in the parish aforesaid, and used to be separated and fenced from a privy-house of office, parcel of the said messuage of the aforesaid *Luke*, by a thick and close wall which belongs to the said messuage of the aforesaid *Luke*, and of right ought to have been repaired by the aforesaid *Luke*, for all the time aforesaid: nevertheless, the aforesaid *Luke* well knowing the premises, but contriving and fraudulently intending unjustly to aggrieve him the said *Robert* in this behalf, and wholly to deprive him the said *Robert* of the use and advantage of the cellar of his messuage aforesaid, and to hinder him of the profit of his commerce aforesaid, on the same first day of *October*, in the abovesaid year of the reign of the said lady the queen, and from thenceforth always until this time so negligently kept and repaired the wall aforesaid (although often requested to repair the same, to wit, by him the said *Robert*, on the same first day of *October*, in the parish aforesaid), that for want of due care and reparation of the same wall, the filthinesses and nasty things of the said privy-house of office flowed out of the said privy-house of office, by the decayed parts and breaches of the wall aforesaid, into

Averment of the usage for defendant to repair.

Breach.

into the cellar aforesaid of him the said *Robert*, and overflowed the same cellar, to wit, in the parish aforesaid, for the whole time aforesaid, by which he the said *Robert* lost the use of his cellar and the profit of his commerce aforesaid, for all the time aforesaid; whereupon the said *Robert* saith, that he is injured, and hath sustained damage to the value of one hundred pounds, and thereupon he brings suit, &c.

Plaintiff damnified.

Tenant *against* Goldwin.

Case 413.

In an action on the case brought by a lessee for years against the owner of the adjoining house, for not repairing a party wall, by which the plaintiff's house was damaged, it is not necessary to state that he was bound by *prescription* to repair the wall; it is sufficient to declare, that he was *possessed* of a messuage for a certain number of years, and that the defendant ought to repair the wall, &c.

ACTION on the case: The plaintiff declared, that on such a day and year he was *possessed*, and yet is possessed of a messuage, situate in such a place, for a certain number of years yet not ended, and also of a cellar parcel thereof; which said cellar lies, and all the aforesaid messuage did lie, contiguous to the messuage of the defendant, in the parish aforesaid; and from a vault, parcel of the defendant's messuage, was wont to be separated by a strong thick wall, which to the messuage of the defendant did belong, and by the defendant, for all the time aforesaid, ought to be repaired; but that the defendant, *machinans*, &c. though often requested to repair the said wall, so negligently kept it in repair, that for default of care in him, and repairing of the same, the filth of the said vault, by the decay and breach of the said wall, in the said cellar did flow, and fill the same for such a time, by which the plaintiff lost the use of his cellar, &c.

The whole question was, Whether the declaration was good to entitle the plaintiff to this action?

Because, as was objected, it was to put a charge upon the defendant, which could not be but by *prescription*, and none was laid here; nor was it said the messuage was * an *ancient messuage* capable of a prescription.

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S. C. 1. Salk. 21. 360. S. C. Holt, 500. S. C. 2. Ld. Ray. 1089. S. C. Ray. Ent. 324. Anne, 244. 2 Vent. 292. Cro. Jac. 43. 123. 4. Mod. 423. 175. 3. Lev. 266. 49. 5 Com. Dig. "Pleader" (C. 39.)

But in maintenance of the declaration, and that it was well, being for *a tort* to his possession, was quoted the case of *Sands v. Trefusis* (a), and the case of *Winford v. Wollaston* (b), the last of which was for stopping a way which the plaintiff *habere,—frui et uti debuit* over the defendant's meadow, without making any title to the way, but merely upon the possession; and it was held that it would be good upon demurrer; and *per quosdam*, upon a special demurrer; and is so much the stronger for that it was a charge against common right. There is difference between charging *a wrong-doer*, and the *tenant of the land* in which one would lay the charge. Besides, the law has respect to the nature of the charge, as whether it arise by the act of the party, or by act in law: as in *assize* for a rent charge against the tenant of the land, the plaintiff must shew his *title*; otherwise it is in case of *assize* for rent service;

1. Burr. 440. 3. Term Rep. 265. Vide Show. 64. 3. Lev. 133. 3. Mod. 51, 52. 132. 294. Pal. 290. Cro. Car. 499. Ld Ray. 266. 11. Mod. 179. 220. Comy. 7.

(a) Cro. Car. 575. (b) 3. Lev. 266.

and

TENANT *against* GOLDWIN.

and the reason of the difference is, because one is of common right, and the other not (*a*). So in an *assize* of common in gross, there must be *a title* made to the plaintiff; *secus* it is of a common appendant, because it is by act in law; and though it may be by prescription, yet that is but subsequent evidence, and not the cause and foundation of it. If *the hundred* be in-

Carth. 212. 451. dicted for not keeping the highway in repair, it need not be said how it is chargeable; but if it were against *a particular person*, it is otherwise: so here, if this action were for not repairing another man's house, or such a highway, there would be reason that the plaintiff must shew *a title*, and a special reason of the charge, because it would be to impose a charge upon him against common right; but here it is to repair his own house, which of common right he is bound to do; and every body, by law, is so far bound to repair his house, that through want thereof another be not prejudiced. At common law, if there be two jointenants of a house, and it wants repairs, a writ *de reparatione faciendâ* will lie for the one against the other: so if the house of one be likely to fall, to the prejudice of another man's house, a writ *de domo reparandâ* will lie, and it is no matter whether it be an ancient house, or a new one: but if the one were an old ruinous house, and a new house be built near, it will not lie, because the word *debet* in the writ would exclude him, and the word *solet* in the writ may be left out (*b*). If a lessee for years build a house, it is waste; and to let it fall is a new waste (*c*). It was held on debate, that if one man have the upper rooms of a house, and another has the foundation and lower rooms, and the upper rooms be out of repair, the owner of the lower rooms has an action against him who has the upper rooms; and so it shall be *vice versa*, for non-repair of the foundation: and we say, the wall *solebat reparari*, which word is as strong as *consuevit*, and takes away all intendment or doubt that it was a new house: so is the case of *Palmer v. Hebblethwaite* (*d*); and the case of *Roswell v. Pryor* (*e*) was after

Vide ante, 20. verdict, and would otherwise have been ill. * One was cutting

* [313] down his hedge, and it fell upon the plaintiff's ground; it is no good plea to say, that it fell against his will; but the defendant ought to shew that he did what he could to hinder it, and that he removed it with all speed (*f*).

Ante, 116. Against this were quoted the case of *St. John v. Moody* (*g*).

Vide 2. Lev. If an *assize* be for rent against a terretenant, the plaintiff is com-

248. pellable to make a title; otherwise if it be brought against the

3. Keb. 528. pernor of the rent: if one nail boards to my window, I need

531. not, in an action for the same, shew my *title*; but if a man who

1. Vent. 214.
319. 2. Vent. 138. 185. 288. 292. 8. Mod. 272. 10. Mod. 25. 11. Mod. 7. 12. Mod. 215.
509. Stra. 634. Ld. Ray. 613.

(*a*) Year-Book 35. *Hen.* 6. pl. 27. 27. *Hen.* 6. pl. 15.

(*b*) Register, 153. b. 2. Inst. 404. Moor. 374. 11. Co. 82.

(*c*) Keilway, 98.

(*d*) 3. Mod. 48.

(*e*) Ante, 116.

(*f*) Vide Year-Book 6. *Edw.* 4. Fitz. Abr. "Trespass," 110.

(*g*) 1. Vent. 274.

has

has ground close to my house, in asserting his right, build in my light, there I must shew my right to have an action against him for it; upon which reason is the case of *Dent v. Oliver (a)*, for hindering the plaintiff from taking toll in his fair, without shewing any *title* to it; good because against a wrong-doer.

TENANT against GOLDWIN.

Vide 2. Show. 243.
2. Cro. 43. 123.
3. Cro. 325. 499. 575.
2. Vent. 186, 187. 350.
Vide ante, 19.

HOLT, *Chief Justice*. The case of *Sands v. Tresusis (b)* is not like this; for there the *solebat* goes to the *currere*, which is the thing complained of; and *solebat* is of an uncertain signification, and properly goes to repeated acts; and it is said the wall *solebat reparari*, and yet it is a permanent thing, and therefore it is very improper to say a permanent thing *solebat*. And he allowed, that formerly and still there is a difference between charging *a wrong-doer*, and *the tenant of the land*; for to charge a terretenant, one must make title by grant or prescription, but none need be made against a wrong-doer: and formerly it was thought necessary, to maintain case against a terretenant for stopping a way, to shew *title*; but the contrary has been holden since *(c)*, and that as well on *demurrer*, as *after verdict*; but I know no case where one puts a charge upon another, except it be of common right, but he ought to shew *title*, as in case of repairing one's house: but if I have a house of office in my ground walled, and no cellar is contiguous to it, and another digs a cellar close to my wall, which stands well until you have dug your cellar, it seems hard to bring a greater charge upon me, by his digging his cellar contiguous to my wall, whereby my wall is in its nature become weaker. Suppose one man has a house, and a cellar contiguous to it, and one wall serves for both, and he sells the cellar; who shall repair the wall? Or suppose this cellar was made after the vault, and the wall thereof; for the one party's making a wall, shall not take away the owner of the contiguous soil's liberty of digging a cellar; but such digging ought not to bring a greater charge upon the other.

GOULD, *Justice*. Most certainly there are a great many cases, that if a man declare that he ought to have common, &c. and it be against the terretenant, or the owner of the soil, there ought to be a *title* made *(d)*, but latter cases have gone otherwise *(e)*. And here it is said, "he ought to repair," and that word "*ought*" will bring the matter in evidence. The difference is between *a declaration* and *a plea in bar (f)*.

(*a*) Cro. Jac. 43.
(*b*) Cro. Car. 575.
(*c*) Strode v. Birt, 4. Mod. 418.
(*d*) 1. Vent. 319. 356.
(*e*) Matthew v. Baker, and Plottney v. Slaughter, Hilary Term, 4. *Will. & Mary*, Roll. 1771.
(*f*) 2 Vent. 183. See Rider v. Smith, Trinity Term, 30. *Geo.* 3. where *per* BULLER, *Justice*, "The distinction is "between cases where the plaintiff lays "a charge upon the right of the defend- "ant, and where the defendant himself "prescribes in right of his own estate. "In the former case, the plaintiff is pre- "sumed to be ignorant of the defendant's "estate, and cannot therefore plead it; "but in the latter, the defendant, know- "ing his own estate, in right of which "he claims a privilege, must set it forth." 3. Term Rep. 766.

And

Tenant against Gooddwin.

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* And at another day, PER TOTAM CURIAM, The declaration is good; for there is a sufficient cause of action appearing in it; but not upon the word *solebat*. If the defendant has a house of office inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. There is a great diversity between a prescription to put a charge upon a man to repair his fence, and to excuse one from a trespass; for such charge must be by prescription. But the reason here is, that one must use his own so as thereby not to hurt another; and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use any thing that is his so as not to hurt another by such user. If a man have two houses, one of which has a house of office that is kept in by the wall of the same house from a cellar in the other, and he sells the house to which the house of office belongs, the buyer is to keep it in good repair, so as not to prejudice the vendor's house; for he is so to use it as not to hurt another. Suppose one sells a piece of pasture lying open to another piece of pasture, which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung, or any thing else. If a man erect a house of office, to which there is contiguous a vacant piece of ground which is his, and by which the house of office is kept in; there, if he sell the vacant ground, and the vendee dig a cellar in it, as he may do, there he must defend his cellar against the house of office. If a man build next to a vacant piece of ground of his own, and then sell the new house, keeping the ground in his own hands, he cannot build upon the waste ground so as to stop the lights of the house; for by sale of the house, all the lights, and all necessaries to make them useful, pass; for by sale of the house, all the convenience it has will pass; and as he himself cannot build to the prejudice of the new house so sold, so cannot the vendee of the vacant ground do it: but if, in that case, he had sold the vacant ground, without reserving the benefit of the lights, the Court doubted, in that case, that vendee might build so as to stop the lights of the vendor, because he parted with the ground without reserving the benefit of the lights; for that case differs from that of *Palmer v. Flechier*: and they said they doubted of the case in *Keilw*. 98. where it is held, that the owner of the lower rooms in a house is bound to repair the foundation: there is indeed a writ in *Nat. Brevium*, 127 to a mayor, to command him that has the lower rooms, to repair the foundation; and him that has a garret, to repair the roof; but that is grounded upon a custom: and the declaration would be better to say only, that the wall and house of office are the defendant's; and that, through default of him, the filth ran into your cellar.

Vide 1. Salk. 22. 360. Ante 245.

1. Lev. 122. 239. 248. 2. Lev. 194. 1. Mod. 55. 2. Salk. 459. Carth. 454, 455. Poph. 170. 1. Sid. 167. Raym. 87. Hob. 131. Ante, 116. Hutt. 136. 1. Salk. 116. 2. Keb. 825. 1. Cro. 419. Carthew, 454, 455.

And BY THE WHOLE COURT, judgment was unanimously given for the plaintiff.

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